In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioner Kenneth F. Fare respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding on May 30, 1978, reversing a judgment adjudicating respondent to be a ward of the juvenile court and committing him to the California Youth Authority for having committed murder in violation of California Penal Code section 187.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix A to this petition, are reported as *In re Michael C.* (1978) 21 Cal.3d 471, 146 Cal. Rptr. 358, 579 P.2d 7. The opinion of the California Court of Appeal for the Second Appellate District, Division Three, reported and then vacated, which affirmed the order of wardship, appears as Appendix B to this petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3) to review a judgment of the California Supreme Court which was entered on May 30, 1978, and became final on June 29, 1978. The present petition for writ of certiorari is filed within the required 90-day period following entry of final judgment. The instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

QUESTIONS PRESENTED

When a juvenile requests the presence of his probation officer during the course of a custodial interrogation, does the Fifth Amendment as interpreted by *Miranda v. Arizona* (1966) 384 U.S. 436 require the cessation of all further interrogation and the suppression of evidence of statements obtained following denial of the request?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . "

STATUTES INVOLVED

California Penal Code, Section 187, in relevant part:

"(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

. . . "

California Penal Code, Section 830.5, in relevant part:

"(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only (1) to conditions of parole or of probation by any person in this state on parole or probation; (2) to the escape of any inmate or ward from a state institution; (3) to the transportation of such persons; and (4) as provided in Section 8597 or 8598 of the Government Code, or when acting pursuant to Section 8617 of the Government Code. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment.

. . . "

California Welfare and Institutions Code, Section 602:

> "Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

California Welfare and Institutions Code, Section 650:

> "(a) A proceeding in the juvenile court to declare a minor a dependent child of the court or a ward of the court under Section 601 is commenced by the filing with the court, by the probation officer, of a petition, in conformity with the requirements of this article.
>
> "(b) A proceeding in the juvenile court to declare a minor a ward under Section 602 of the court is commenced by the filing with the court, by the prosecuting attorney as petitioner, of a petition, in conformity with the requirements of this article."

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent is a minor who was committed to the California Youth Authority as a ward of the Superior Court of the State of California in and for the County of Los Angeles on May 10, 1976, following the juvenile court's finding under California Welfare and Institutions Code section 602 that respondent had committed murder

in violation of California Penal Code section 187.

On January 24, 1977, the Court of Appeal of the State of California, Second Appellate District, Division Three, affirmed the judgment in a unanimous opinion. (Appendix B.)

Respondent's application to the California Supreme Court for a hearing was granted, and on May 30, 1978, that court in a divided opinion, reversed the judgment on the ground that the interrogation of respondent following the denial of his request to see his probation officer constituted a violation *per se* of the requirements laid down in *Miranda v. Arizona* (1966) 384 U.S. 436. Petitioner's application for stay of issuance of remittitur and for order deferring the execution and enforcement of judgment was denied by the California Supreme Court on June 29, 1978. Three of the seven justices of the court were of the opinion that the application should have been granted. (Appendix A.)

On July 28, 1978, Mr. Justice Rehnquist ordered enforcement of the judgment of the California Supreme Court stayed pending timely filing and disposition by this Court of a petition for a writ of certiorari.

B. Statement of Facts Adduced at the Juvenile Court Adjudication Hearing

On January 19, 1976, at approximately 9:30 p.m. Helen Yeager arrived at her home located at 8939 Paloma Avenue in Los Angeles County, State of California. She was accompanied by her husband. Mrs. Yeager then left the house for about seven minutes to look for the family dog. As she left, she observed respondent standing across the street from her house. When she returned, she found a trail of blood leading to her husband's dead body, lying in a

pool of blood inside the house. (RT pp. 90-92.)[1] Mr. Yeager was killed by a gunshot wound to the neck. (RT pp. 112-113.)

John Dennis Sheehan, a neighbor of the Yeagers', saw a vehicle with three occupants arrive at the Yeagers' house at approximately 9:30 p.m. on January 19, 1976. (RT pp. 243-248.) Mr. Sheehan then observed Mrs. Yeager leave and subsequently he heard a loud noise (like a bang) coming from the Yeager house. (RT pp. 279-282.)

On February 4, 1976, respondent had a conversation with a Los Angeles police officer at a police station in Van Nuys, California. After advising respondent of his constitutional rights, the interrogating officer continued the conversation as follows:

> Q. . . . Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. Can I have my probation officer here?
>
> Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

---

[1] "RT" refers to the "Reporter's Transcript" of the trial court proceedings and which was included as part of the record before the California Supreme Court.

A. How I know you guys won't pull no police officer in and tell me he's an attorney?

Q. Huh?

A. [Repeat of last answer.]

Q. Your probation officer is Mr. Christiansen.

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you.

(*In re Michael C.* (1978) 21 Cal.3d 471, 473-474, 146 Cal. Rptr. 358, 579 P.2d 7; *see also* RT pp. 355-356; ST pp. 1-2.)[2]

Later during the interrogation, respondent confessed to the offense. (*In re Michael C., supra* at p. 474; ST p. 22.)

Charles P. Christiansen, respondent's probation officer from a previous offense, stated that he had counseled respondent as to family problems and had told respondent to contact him whenever respondent had contact with the police. (RT pp. 371-373.) He never told respondent that he was not supposed to talk to the police. He told respondent that he should not admit openly to an offense

[2]"ST" refers to "Statement Transcript" admitted as Petitioner's Exhibit 18 in the trial court and which was included as part of the record before the California Supreme Court.

without some advice from his parents or a lawyer. (RT pp. 375-376.)

No affirmative defense was presented at the hearing on the factual basis for the petition filed under California Welfare and Institutions Code section 602. (RT p. 409.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE CALIFORNIA SUPREME COURT HAS IMPROPERLY INTERPRETED *MIRANDA v. ARIZONA* TO EXCLUDE STATEMENTS OBTAINED FROM A MINOR AFTER HIS REQUEST FOR THE PRESENCE OF HIS PROBATION OFFICER WAS DENIED

A. The *Miranda* Exclusionary Rule Based on the Requirement of Specific Advisements and Waivers of Rights Has Not Been Extended By This Court.

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (*Miranda v. Arizona* (1966) 384 U.S. 436, 478.)

When this Court rendered its far-reaching decision in *Miranda v. Arizona, supra,* it did so in the context of a philosophy that while involuntary confessions are constitutionally unacceptable, the admission of a suspect's statement that is the product of his free will is an acceptable and useful tool of law enforcement. As such, the rule announced in *Miranda* attempted a balance

between the community's need for effective enforcement of the criminal law and the individual's rights under the Fifth and Fourteenth Amendments.

The rule of *Miranda*, establishing specific warnings and waivers as a prerequisite to the admission of statements obtained during custodial interrogation, was criticized by the dissenters in that opinion because of its excessive rigidity. Justice Clark warned that: "[s]uch a strict constitutional specific inserted at the nerve center of crime reduction may well kill the patient." (*Miranda v. Arizona, supra,* at pp. 500-501 (Clark, J., dissenting).) In recent years, this Court has ruled that the rigid exclusionary rule established in *Miranda v. Arizona, supra,* is not without exceptions. In *Michigan v. Tucker* (1974) 417 U.S. 333, 446-452, this Court held that not all fruits of a confession obtained in violation of the requirements laid down in *Miranda* would be required to be suppressed where a suspect's confession was obtained prior to the *Miranda* decision but his trial conducted after the decision. In making its holding the Court noted:

> "The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:
>
> '[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' "
>
> (Citations omitted.) (*Michigan v. Tucker, supra,* at p. 444.)

This Court has also held that the invocation by a suspect of his Fifth Amendment right as to one charge does not

necessarily require exclusion of a confession obtained after a reiteration of *Miranda* rights at a later time on a different charge. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104-107.)

In *Harris v. New York* (1970) 401 U.S. 222, 225-226, a statement obtained in violation of a suspect's *Miranda* rights was held admissible to impeach a testifying defendant, and in *Oregon v. Hass* (1975) 420 U.S. 714, 719, the Court held admissible for impeachment purposes a statement made by defendant even though the defendant had previously exercised his *Miranda* rights by requesting to speak to his attorney.

It is noteworthy that while the Court has made exceptions to the exclusionary rule imposed by *Miranda*, the Court has in no case expanded the number of advisements and waivers originally required by *Miranda*. Nor has the Court ever indicated that a request for any person other than an attorney would constitute an invocation of the right against self-incrimination which would preclude the admission into evidence of any statements made thereafter.[3]

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[3]The continuing validity of the strict exclusionary rule under *Miranda* has come into question. (*See e.g., Brewer v. Williams* (1978) 430 U.S. 387, 420-429 (Berger, C.J., dissenting).)

B. The California Supreme Court Impermissibly Attempted to Expand the Requirements of *Miranda v. Arizona, supra,* by Holding That a Minor Suspect's Request for His Probation Officer Constituted *Per Se* an Invocation of the Right to Silence Requiring the Cessation of Further Interrogation.

A State may not as a matter of federal constitutional law impose greater *Miranda* restrictions when this Court specifically refrains from imposing them. (*Oregon v. Hass, supra,* (1975) 420 U.S. 714, 719.) In the instant case the California Supreme Court has given an unnecessarily expansive reading to *Miranda* by ruling inadmissible statements obtained from a minor following denial of his request to see his probation officer. Petitioner submits that where, as here, a state court reads *Miranda* too broadly, it is appropriate for this Court to grant a writ of certiorari in order to insure that the rule adopted in *Miranda* is confined to the express terms and logic of the original opinion, and that *Miranda* is not cut "loose from its own explicitly stated rationale." (*Beckwith v. United States* (1976) 425 U.S. 341, 345; *see also Oregon v. Mathiason* (1977) 429 U.S. 492, 493-496.)

In defining the specific advisements and waivers required to be taken prior to the commencement of custodial interrogation, this Court in *Miranda* included the right to consult with counsel prior to questioning and also the right to have counsel present during the interrogation. (*Miranda v. Arizona, supra,* at 469-470.) The Court noted that "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators" (*Id.* at 469), and held therefore that the right to the presence of counsel at the interrogation was indispensable to the

protection of a defendant's Fifth Amendment privilege against self-incrimination. The Court further noted that at the interrogation counsel could mitigate the danger of untrustworthiness in statements provided, help to reduce the likelihood of police coercion, and witness any coercion that might take place. The presence of counsel would also help to guarantee that the statement given to the police would be accurate and correctly reported. (*Id.*) While the requirement of the right to counsel under *Miranda* has been characterized as based on the Fifth Amendment, there can be no question that counsel was singled out by the Court because of the importance of the role of counsel under the Sixth Amendment. (*See Miranda v. Arizona, supra,* at pp. 513-514 (Harlan, J., dissenting).)

In the instant case, respondent's interrogation and ultimate confession was preceded by advisement and waiver of all *Miranda* rights, including the right to counsel. Under such facts, petitioner submits that the proper rule for judging the admissibility of respondent's confession is whether, considering the totality of the circumstances, the free will of the minor was overborne. (*United States v. Washington* (1977) 431 U.S. 181, 188; *Morales v. New York* (1969) 396 U.S. 102, 104.) In the instant case, the California Supreme Court specifically rejected the totality of circumstances doctrine and held that a request by a minor for his probation officer *per se* invokes the right to silence. (*In re Michael C., supra,* at p. 477.)

Petitioner submits that the *per se* exclusionary rule adopted by the California Supreme Court is inconsistent with the intents and purposes of *Miranda* and that it unreasonably hampers law enforcement and the probation office in their investigative efforts. The requirement of

Miranda that a suspect be accorded the right to counsel prior to and during an interrogation is based on the special role that counsel and no other person has in the judicial process, namely, to protect the interest of the accused against the interest of any other party. Rules of professional conduct and ethics are designed to ensure that counsel is unhampered by any conflict of interest from vigorously defending the rights of his client. A probation officer, by contrast, has no such singular duty. As Justice Mosk stated in his concurring opinion in *In re Michael C., supra,* at p. 478:

> "[T]he majority concede, as they must, that the probation officer serves as a peace officer ([Cal.] Pen. Code § 830.5) and has the duty to file charges against a minor ([Cal.] Welf. & Inst. Code § 650), including those arising from the instant circumstances. Thus, regardless of the healthy rapport which may have developed between this arrestee and his probation officer, duties of the latter compel him to render reasonable assistance to his fellow peace officers."

It is clear that the majority in *In re Michael C., supra,* at p. 477, incorrectly concluded: (1) that "Consultation with a probation officer thus acts as a 'protective [device] . . . to dispel the compulsion inherent in custodial surroundings.' (*Miranda v. Arizona, supra,* (1966) 384 U.S. 436, 458) . . ." and (2) that by requesting to see his probation officer the minor no less invoked the protection against self-incrimination than if he had asked for the presence of an attorney.

In the instant case when respondent requested to see his probation officer, he was told by the interrogating officer that the probation officer could not be reached at that time

but that respondent had a right to an attorney. The minor was told there was a good chance he could talk to his probation officer later but that the probation officer would not be called at that time. The minor was then readvised of his right to have an attorney present and his right to remain silent. Respondent indicated he understood his rights and stated that he wished to speak to the police officer. The totality of the above circumstances indicates clearly that respondent's free will was in no way overborne by the police prior to his confession, (*United States v. Washington, supra,* (1977) 431 U.S. 181, 188), and that the juvenile court acted properly in overruling respondent's *Miranda* objections. The creation by the California Supreme Court of a new *per se* exclusionary rule constituted a radical departure from the otherwise specific procedural requirements outlined in *Miranda*.

Such a departure from the precise requirements of the *Miranda* opinion will serve to generate confusion as to what constitutes a proper waiver of rights during custodial interrogation. Petitioner submits that the California Supreme Court's impermissible expansion of the requirements of *Miranda v. Arizona* requires review by this Court.

II.

THE OPINION BELOW IS BASED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY

The instant decision of the California Supreme Court was based solely on an interpretation of the Federal Constitution and *Miranda v. Arizona, supra.* There are no references to state statutory or constitutional grounds. (*In re Michael C., supra,* (1978) 21 Cal.3d 471, 473-478, 146 Cal. Rptr. 358, 579 P.2d 7.) The state cases

principally relied on by the California Supreme Court were also interpretations of *Miranda* or of the Federal Constitution. (*See People v. Burton* (1971) 6 Cal.3d 375, 99 Cal. Rptr. 1, 491 P.2d 793; *People v. Randall* (1970) 1 Cal.3d 948, 83 Cal. Rptr. 658, 464 P.2d 114; *People v. Ireland* (1969) 70 Cal.2d 522, 75 Cal. Rptr. 188, 450 P.2d 580; *People v. Fioritto* (1968) 68 Cal.2d 714, 68 Cal. Rptr. 817, 441 P.2d 625.)

While the California Supreme Court discussed the role of probation officers in California (*In re Michael C., supra,* at p. 476), the decision to exclude statements made following the denial of a request for a probation officer is not based on any unique status afforded probation officers by California law. Rather, the California Supreme Court based its holding on the Fifth Amendment right to silence and privilege against self-incrimination as defined in *Miranda*. Relying on the *Miranda* court's holding regarding requests for an attorney, the decision below holds that, under federal constitutional principles, a juvenile's request for a probation officer is *per se* the same as a request for counsel. (*Id.* at p. 477.)

For the foregoing reasons, petitioner submits that the opinion below is based exclusively on federal constitutional authority and is properly the subject of review by this Court on writ of certiorari.

CONCLUSION

For the foregoing reasons petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MICHAEL C., a Person Coming Under the Juvenile Court Law.

KENNETH F. FARE, as Acting Chief Probation Officer, etc.,

Plaintiff and Respondent,

v.

MICHAEL C.,

Defendant and Appellant.

CRIM. 19921
Super. Ct. No. 466633

Defendant Michael C., a 16-year-old minor, appeals from juvenile court orders sustaining allegations that he comes within Welfare and Institutions Code section 602 for having killed Robert Yeager (Pen. Code, § 187), adjudicating him to be a ward of the court, and committing him to the Youth Authority. We concur in defendant's contention that his confession was obtained in violation of the rules announced in Miranda v. Arizona (1966) 384 U.S. 436 and subsequent cases, and that its admission into evidence constituted reversible error.

On February 4, 1976, police interrogated defendant at the Van Nuys police station. After advising defendant of his *Miranda* rights, the police interrogating officer continued the conversation as follows:

"Q. . . . Do you understand all of these rights as I have explained them to you?

"A. Yeah.

"Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?

"A. What murder? I don't know about no murder.

"Q. I'll explain to you which one it is if you want to talk to us about it.

"A. Yeah, I might talk to you.

"Q. Do you want to give up your right to have an attorney present here while we talk about it?

"A. *Can I have my probation officer here?*

"Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

"A. How I know you guys won't pull no police officer in and tell me he's an attorney?

"Q. Huh?

"A. [Repeat of last answer.]

"Q. Your probation officer is Mr. Christiansen.

"A. Yeah.

"Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

"A. Yeah.

"Q. Okay, will you talk to us without an attorney present?

"A. Yeah I want to talk to you." (Emphasis added.)

Later during the interrogation, defendant confessed.

We shall point out that under the rules established in Miranda v. Arizona, *supra*, and further elaborated in this state in People v. Burton (1971) 6 Cal.3d 375, the police unlawfully obtained defendant's confession. Defendant's request to see his probation officer at the commencement of interrogation negated any possible willingness on his part to discuss his case with the police; it thereby invoked his Fifth Amendment privilege.

Noting that an environment of incommunicado police-dominated interrogation "is created for no purpose other than to subjugate the individual to the will of his examiner," the United States Supreme Court in *Miranda*, concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (Miranda v. Arizona, *supra*, 384 U.S. 436, 457, 467.) The Supreme Court in *Miranda* set down four warnings which must be given to persons in "custodial surroundings," and then specified the protections that must be afforded after the rendition of such warnings: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. [Fn. omitted.] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (Miranda v. Arizona, *supra*, 384 U.S. 436, 473-474.)

Recognizing that the suspect may not expressly state that he wants an attorney, we have held in previous cases that any conduct which "reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police *at that time*" amounts to an invocation of the Fifth Amendment privilege. (People v. Randall (1970) 1 Cal.3d 948, 956.) We have variously held that a suspect's refusal to sign a waiver of his constitutional rights, a suspect's statement, "Call my parents for my attorney," and a suspect's telephone call to his attorney, in and of themselves each invokes the Fifth Amendment privilege. (People v. Fioritto (1968) 68 Cal.2d 714; People v. Ireland (1969) 70 Cal.2d 522; People v. Randall, *supra*, 1 Cal.3d 948.)

In this case we must decide whether a minor's request for his probation officer's presence "reasonably appears inconsistent with a present willingness" concurrently to "discuss his case freely and completely with police. . . ." (People v. Randall, *supra*, 1 Cal.3d 948, 956.) In People v. Burton, *supra*, 6 Cal.3d 375, we held that a minor's request to consult his parents invoked the minor's Fifth Amendment privilege. As we stated there: "It would certainly severely restrict the 'protective devices' required by *Miranda* in cases where the suspects are minors if the only call for help which is to be deemed an invocation of the privilege is the call for an attorney. It is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance and it is unrealistic to attribute no significance to his call for help from the only person to whom he normally looks—a parent or guardian. It is common knowledge that this is the normal reaction of a youthful suspect who finds himself in trouble with the law." (People v. Burton, *supra*, 6 Cal.3d 375, 382.)

In view of the emphasis which the juvenile court system places upon the close relationship between a minor and his probation officer,[1] and in light of the probation officer's instructions in the present case that his ward contact him immediately in case of trouble,[2] the "normal reaction" of the minor here would be to request consultation with his probation officer. Fearing that the police would take advantage of his ignorance,[3] Michael wanted and needed the advice of someone whom he knew and trusted. He therefore asked for his probation officer—a personal advisor who would understand his problems and needs and on whose advice the minor could rely. By analogy to *Burton*, we hold that the minor's request for his probation officer — essentially a "call for help" — indicated that the minor intended to assert his Fifth Amendment privilege. By so holding, we recognize the role of the probation officer as a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement the protective and rehabilitative powers of the juvenile court.

The Attorney General contends, however, that the request here for a probation officer can be distinguished

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[1]See Bryan v. Superior Court (1972) 7 Cal.3d 575, 587; In re Gladys R. (1970) 1 Cal.3d 855, 860, footnote 7.

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[2]The probation officer testified at trial that he had "instructed Michael that at any time he has a police contact, even if they stop him and talk to him on the street, he is to contact me immediately," reasoning that "many times the kids don't understand what is going on, and what they are supposed to do relative to police . . . ."

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[3]Clearly defendant's fear that the police would bring in a police officer under the pretext of providing Michael with an attorney was real enough. As the interrogating officer said to Michael later in the interview, "Well we don't always play fair, do we?"

from the request in *Burton,* for, instead of affording the counsel and protection of a parent, the probation officer represents an "arm of the prosecutorial system." That the probation officer serves as a peace officer (Pen. Code, § 830.5) and has been charged with the duty to file a petition alleging that a minor committed the claimed offense (Welf. & Inst. Code, § 650), however, does not alter the fact that the probation officer is frequently the person to whom a minor might turn for help on such matters as to whether or not he should obtain an attorney. When Michael C. asked to see his probation officer, he was not seeking to confide in a prosecutor.

The People assert that once we extend our holding in *Burton* to include a request to see a probation officer, we cannot reasonably distinguish a request for consultation with one's football coach, music teacher or clergyman. The request for the probation officer, however, is entirely distinguishable; the probation officer is an official appointed pursuant to legislative enactment "to represent the interests" of the juvenile (Welf. & Inst. Code, § 280). Since the inception of the juvenile court system the probation officer has borne the duty to advise and care for the juvenile defendant. Consultation with a probation officer thus acts as a "protective [device] . . . to dispel the compulsion inherent in custodial surroundings" (Miranda v. Arizona, *supra,* 384 U.S. 436, 458) precisely because the probation officer is particularly well-suited to provide the minor suspect with "help in how to conduct himself with police" (People v. Burton, *supra,* 6 Cal.3d 375, 383).

The People further rely on People v. Lara (1967) 67 Cal.2d 365, and In re Dennis M. (1969) 70 Cal.2d 444, cases in which we held that the "totality of the circumstances" governed whether a juvenile had the capacity to understand the meaning of the warnings given him, and

knowingly and intelligently to waive his *Miranda* rights. In the present case, the People argue that Michael C. is an "older juvenile" who has had previous experience with the police. Contending that nothing in the record suggests that the police coerced Michael by their questioning, the People thus conclude that, based on the totality of circumstances, the trial court properly ruled that Michael's confession was voluntary.

In cases in which we must decide whether a confession is voluntary or coerced we have looked to the "totality of the circumstances" to find whether the confessant was capable of understanding the interrogation and voluntarily confessed or whether his will was actually overcome. Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination. Thus our question turns not on whether the defendant had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. We hold that in doing so he no less invoked the protection against self-incrimination than if he asked for the presence of an attorney.

Finally, in People v. Randall, *supra,* 1 Cal.3d 948, 957, we held that the People bear the burden of demonstrating "that a questioned confession meets the constitutional tests of admissibility." Similarly in *Burton* we placed the burden on the People to show that a request by a minor to see his parents "is not an indication of that minor's unwillingness to continue talking with police or of a desire for help in how to conduct himself with police. . . ." (People v. Burton, *supra,* 6 Cal.3d 375, 383.) Accordingly, we

hold here that the People must meet the burden of proving that a minor who requests to see his probation officer does not intend to assert his Fifth Amendment privilage. In the instant case, the People did not meet that burden.[4]

Because the police did not cease custodial interrogation immediately upon defendant's exercise of his Fifth Amendment privilage, the trial court should not have admitted the confession which was obtained by subsequent questioning. The admission of such confession was prejudicial per se and compels reversal of the orders. (People v. Burton, *supra,* 6 Cal.3d 375, 384; People v. Randall, *supra,* 1 Cal.3d 948, 958.)

The judgment is reversed.

TOBRINER, J.

We concur:

MOSK, J.

RICHARDSON, J.

NEWMAN, J.

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[4]The dissent suggests that although it is clear in the present case that defendant requested to see his probation officer out of a desire for help in how to conduct himself with the police (cf. People v. Burton, *supra*, 6 Cal.3d at p. 383), we should not find that such a request invoked defendant's Fifth Amendment rights. The dissent apparently argues that no invocation of Fifth Amendment rights occurred, because once defendant's request was denied, defendant was willing to continue the interrogation with the police. Under such an analysis, of course, the police could ignore a defendant's request for an attorney and still argue that any subsequent confession was properly obtained, since the defendant was "willing" to continue the interrogation in the absence of his attorney. The dissent's approach flies directly in the face of *Miranda*, which as we have noted, explicitly holds that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (384 U.S. at p. 474. See also People v. Burton, *supra*, 6 Cal.3d at p. 384.)

CONCURRING OPINION BY MOSK, J.

While under these facts I must concur in the majority opinion, I have serious reservations about the ultimate result.

The majority concede, as they must, that the probation officer serves as a peace officer (Pen. Code, § 830.5) and has the duty to file charges against a minor (Welf. & Inst. Code, § 650), including those arising from the instant circumstances. Thus, regardless of the healthy rapport which may have developed between this arrestee and his probation officer, duties of the latter compel him to render reasonable assistance to his fellow peace officers.

If this minor had contacted his attorney, or his parents (People v. Burton (1971) 6 Cal.3d 375), either or both might have advised him to remain silent, that his legal prospects would be enhanced by aloofness rather than cooperation, that the burden of proving the case against him should not be eased by voluntary disclosures.

May a probation officer, a statutory peace officer, properly give that kind of advice, even if he believes it to be in the best interests of the minor? I doubt it. Consistent with his public responsibilities, the probation officer must counsel his charge to be cooperative and to help solve the crime, even if by doing so the minor implicates himself in a serious felony.

Thus I am concerned that ultimately the minor will not benefit by deeming his probation officer to be a surrogate attorney or parent, a role that the officer cannot objectively assume. Where a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner.

Still another potential problem looms on the horizon. When the probation officer, a statutory peace officer,

advises the minor to cooperate with the police, perhaps even to confess, the minor is likely to complain later of what he will perceive as pervasive law enforcement pressure. He may argue, with some rationality, that he had been subjected to a variation of the Mutt-and-Jeff technique criticized in *Miranda*: initial interrogating by overbearing officers, then comforting by a presumably friendly and gentle peace officer in the guise of a probation officer. (Miranda v. Arizona (1966) 384 U.S. 436, 452.) The bottom line is that pursuant to the technique he will have submitted to interrogation. When that argument is made to us, as it inevitably will be one day, we will face a difficult problem.

With all my misgivings, however, I agree with the majority that the People have not meet the burden imposed by People v. Randall (1970) 1 Cal.3d 948, 957, of establishing that the "questioned confession meets the constitutional tests of admissibility."

MOSK, J.

I concur:

BIRD, C.J.

DISSENTING OPINION BY CLARK, J.

The question presented is whether the People carried their burden of proving that defendant did not intend to assert his privilege against self-incrimination when he asked to see his probation officer. Reviewing this question in light of the totality of circumstances shown by the record, I, like the trial court and the unanimous Court of Appeal, conclude that the People did carry their burden. Accordingly, I would affirm the judgment.

Because of confusion created by the majority, it is necessary to emphasize that this question is one of fact to be decided in light of the *totality of circumstances shown by the record.*

On the one hand, the majority appear to hold that defendant's request for his probation officer constituted, per se, an invocation of his Fifth Amendment privilege, foreclosing consideration of the "totality of the circumstances" to determine whether his request was actually intended as such an invocation. "In cases in which we must decide whether a confession is voluntary or coerced we have looked to the 'totality of the circumstances' to find whether the confessant was capable of understanding the interrogation and voluntarily confessed or whether his will was actually overcome. Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination." (*Ante,* p. 477.)

On the other hand, in the succeeding paragraph the majority appear to recognize that our inquiry into whether defendant asserted his Fifth Amendment privilege is not concluded when we find, what is not disputed, that he asked for his probation officer, but that we must proceed to

inquire whether his request was meant as an assertion of the privilege. "[W]e hold here that the People must meet the burden of proving that a minor who requests to see his probation officer does not intend to assert his Fifth Amendment privilege." (*Ante,* pp. 477-478.) This recognition of the People's right to assume that burden is compelled by People v. Burton (1971) 6 Cal.3d 375. "[W]e hold that when, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, *in the absence of evidence demanding a contrary conclusion,* be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege." (*Id.* at pp. 383-384, italics added.)

What term of art applies to the evidence bearing on the question whether defendant intended to assert his privilege against self-incrimination when he asked for his probation officer? The term that comes to mind is the "totality of the circumstances" shown by the record. However, quibbles over terminology are of little moment so long as it is clearly understood that one must consider the circumstances — the "context," if you prefer — of defendant's request in order to determine its significance.

The question whether defendant's request for his probation officer manifested an unwillingness to proceed with the interrogation in his absence is readily resolved by simply reading the succeeding portion of the transcript. After being informed that his probation officer would not then be summoned, defendant was again advised of his right to remain silent and again asked if he understood that right. Replying that he did understand it, defendant

reiterated his willingness to continue the interrogation. (*Ante,* pp. 473-474.)

Recognizing that it is a question of fact whether defendant intended to assert his privilege against self-incrimination by requesting his probation officer, the distinguished trial judge[1] concluded that the record clearly indicated that defendant was willing to proceed with the interrogation in the absence of his probation officer. Affirming the judgment, the Court of Appeal unanimously concluded that "the 'totality of the circumstances' affords sufficient 'affirmative proof' of an intent to waive the privilege." After independently reviewing the record I reach the same conclusion and lament the fact that the majority free a confessed murderer.[2]

CLARK, J.

I concur:
MANUEL, J.

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[1]That Judge Bonnie Lee Martin is the author of one of the most widely used handbooks on search and seizure issues is but one indication of her scholarship and sensitivity to the constitutional issues present in situations involving the admissibility of evidence. (See Martin, Comprehensive California Search and Seizure (1971).)

[2]The Court of Appeal observed that without the confession the balance of the evidence is insufficient to sustain the conviction.

Appendix B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In the Matter of MICHAEL WAYNE C.,

a Person Coming Under the Juvenile Court Law,

Appellant,

v.

KENNETH F. FARE, as Acting Chief Probation Officer,

Petitioner and Respondent.

2d Crim. No. 29273
Sup.Ct.Juv. No. 466633

Michael Wayne C., a 16 year old minor, appeals from orders of the juvenile court made April 12 and May 10, 1976, sustaining the allegations of paragraph I of a petition filed by the county probation officer alleging Michael to be a person who came within the provisions of Welfare and Institutions Code section 602 for having killed one Robert Yeager in violation of Penal Code section 187 and adjudicating him to be a ward of the court and committing him to the Youth Authority. The appeal lies. (Welf. & Inst. Code, § 800.)

Contentions

It is contended that his confession, obtained in violation of Fifth Amendment constitutional rights should have been excluded dictating reversal of the orders. (*People v.*

Fioritto, 68 Cal.2d 714, 720.)[1]

Discussion

It is argued that, by requesting the presence of his probation officer at the time of interrogation by police sergeant Stanley L. Miller, the minor invoked his privilege against self-incrimination rendering the confession thereafter obtained invalid. In this respect Sergeant Miller testified:

"BY MR. LEVITIN: [For People]

Q. Sergeant Miller, during the course of your investigation, did you have a conversation with defendant Michael C . . . . ?

A. Yes, sir.

Q. And when and where did that conversation take place?

A. That occurred on February 4, 1976, at Van Nuys Police Station.

Q. During the course of that conversation, before initiating the conversation, did you advise defendant C . . . of his constitutional rights?

A. Yes, sir.

Q. What did you tell him in that regard?

A. I advised defendant C . . . from a card, L.A.P.D. Form 15.30.

Q. Did you read that card to him?

A. Yes, sir, I did.

Q. Would you read it to us now in the same manner that you read it to him?

A. I advised Michael C . . . :

'You have the right to remain silent. If you give up the right to remain silent, anything you say

[1] It appears that absent the confession the evidence was insufficient to sustain the conviction. No argument to the contrary is presented by the People.

can and will be used against you in a court of law.

'You have the right to speak with an attorney and to have the attorney present during questioning.

'If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.'

I asked Michael C . . . 'Do you understand each of these rights as I have explained them to you,' and he stated, 'Yeah.'

I said, 'Do you wish to give up your rights to remain silent,' and he said, 'Yes.'

I said, 'Do you wish to give up your right to an attorney, have him present?'

At that time, he asked if he could speak to his probation officer. I advised him he had a right to have an attorney present. I would not call his probation officer, and he stated he would talk to me without an attorney at that point.

Q. All right, now, were there any other persons besides yourself and defendant C . . . present during this conversation?

A. Yes, Investigator Steinauer.

Q. And this conversation took place at the Van Nuys Police Station, one of the interview rooms?

A. Yes, sir.

Q. And was that conversation recorded?

A. Yes, sir.

Q. And did you cause or procure a transcript to be prepared of that recording?

A. Yes, sir.

Q. And have you reviewed the transcript and the recording?

A. Yes, sir.

Q. And is the transcript a true and correct copy of the recording, insofar as you are able to tell?

A. Yes, Sir.

MR. LEVITIN: I'd like to have marked as People's next in order, People's —

THE COURT: 16, Petitioner's 16.

MR. LEVITIN: — this transcript of Michael C . . . bears the tape number 61725."

Then the following occurred:

MISS RICE: Your Honor, there are some additions that I believe the district attorney would agree to that are not contained in the transcript. Perhaps we should give them to the court at this time.

Line — On page 2, line 4, transcript reads: 'Yeah, I want to talk to you.' Should read, 'Yeah, I might talk to you.'

THE COURT: All right, may we correct by interlineation?

MR. LEVITIN: Petitioner so stipulates.

THE COURT: 'Yeah, I might talk to you.'

MISS RICE: Line 10 —

MR. LEVITIN: What page?

MISS RICE: This is page 2. 'How I know you guys won't pull no police officer in and tell me he is an attorney?'

MR. LEVITIN: So stipulated.

THE COURT: Will be amended by interlineation on line 10, page 2, to read: 'How I know you guys won't pull no police officer in and tell me he is an attorney?'

MISS RICE: Yes. Line 1 is then a repeat of line 10.

Your Honor, there may be one or two words different in the repeat, but it's in substance a repeat.

Line 13, 'Your probation officer is Mr. Christianson.' Line 15, 'Well, I am not going to call' — the word 'him' is not on the tape. It is really, 'Well, I am not going to call Mr. Christianson.'

Line 24, 'Yeah, I want to talk to you.'

MR. LEVITIN: In other words, the lead-in words are unintelligible, and the 'I want to' —

THE COURT: Those changes have been made by the court by interlineation.

MISS RICE: We began at page 3, line 3.

THE COURT: And it goes to what?

MISS RICE: Goes to line 11 or 13, I am not sure what I indicated to the court. I stopped at line 11.

THE COURT: And then as to page 14, this is simply going to be a stipulation rather than listening to the tape, line 13 through 16.

MISS RICE: Your Honor, 'Hey, man,' something unintelligible, 'Tell nobody what I have been telling you, man.' The questioner would be the investigator — something unintelligible, 'No way, no way,' and then, 'I am going to get my coffee.'

THE COURT: All right. Does that complete the preliminary matters on foundation as far as the petitioner's concerned, Mr. Levitin, or do you have anything additional you want to ask Sergeant Miller concerning foundation for C . . .'s statement?

MR. LEVITIN: That's all petitioner offers with regard to the foundational regard to C . . . . "[2]

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[2]The clerk's transcript indicates that the transcript of tape no. 61725 (defendant) Exh. No. 16 and the tape itself Exh. No. 17 were marked for identification only on April 9, 1976, and that on April 12 Exh. 17 was received in evidence. The reporter's transcript shows that the transcript was "marked" as Exh. 16. The index fails to disclose that either 16 or 17 were ever received in evidence. The trial court expressly referred to the transcript in ruling on the motion to exclude the confession.

In denying the motion to exclude the confession the trial court summarized the situation by saying:

"THE COURT: I think it is a factual question in each case as to whether the minor is indicating that he does not want to give up his right to remain silent or just what the purpose of the statement is.

I point out at page 2 of the transcript that prior to asking, 'Can I have my attorney or my probation officer here,'[3] the minor does state, 'Yeah, I might talk to you.' It seems to me that the statement both before and after the question whether he can have his probation officer here indicates pretty clearly that the minor is willing to talk without the probation officer or without the attorney.

Sergeant Miller apparently has gone on to — after the question, 'Can I have my probation officer here,' he has gone on again to re-explain the right, 'If you don't want to talk to us, you don't have to. If you don't want to say something, if you want to say something, you can. If you don't want to say something, you don't have to. That's

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[3]Here the court's quotation of the minor's question from the transcript is both improper and inaccurate, improper because the transcript was not in evidence and inaccurate because the minor did not in fact request presence of an attorney. At no place in the record before us is it disclosed that the minor ever asked for an attorney nor does he so contend on appeal. The court correctly quoted the minor's question in the next paragraph as "Can I have my probation officer here." We too have gone outside the record out of an abundance of caution in view of the confusion created by the record as presented on appeal in this case and the obvious assumption by all concerned that the transcript, which had been marked for identification was in fact in evidence.

your right. Do you understand?'

The minor says, 'Yes.' He explains that, 'We can talk to the probation officer later, but I am not going to call him right now,' and it seems to me we are dealing here with a 16, 16 and a half year old minor who has been through the court system before, has been to camp, has a probation officer. We are not dealing with a young, naive minor with no experience with the courts. I just do not construe it in this case as an indication of the privilege.

In Burton, as you recall, the parent was present in the police station and had requested to see the minor, and the minor had several times requested to see the parents, and while they don't set forth the conversation or the interrogation that occurred in Burton, one certainly gets the impression from reading the decision that the minor was just kind of worn down. I don't see that in this case at all. The statement, 'Can I have my probation officer present,' occurs right at the outside of the conversation. There is no evidence of any lengthy prior interrogation or anywhere keep having to — or they keep pursuing a substantive offense prior to a waiver of a right. It seems to me there is a clear waiver at the outset in this case.

The court denies the motion to exclude the conversation."

Although it is subsequently argued that threats and promises by the police and the invocation of the right to silence invalidated the confession,[4] we must conclude that there was a knowing and intelligent waiver of the minor's

[4]These matters were resolved as factual matters adversely to the position taken on appeal. The trial court's findings in this respect are supported by the record before us and are binding on appeal. (*People v. Duren*, 9 Cal.3d 218, 238.)

Miranda[5] rights unless it can be said that the request to speak to a probation officer was in and of itself sufficient to invoke his privilege against self-incrimination guaranteed by the Fifth Amendment.

In *People v. Burton*, 6 Cal.3d 375, a 16 year old minor was arrested, taken to the police station, booked and placed in a cell for questioning at which time he requested to see his parents (his father had arrived during the booking process but had been refused a request to see his son). Subsequently the minor was advised of his *Miranda* rights which he waived and then confessed to the crime. Concluding that the People had presented no proof that the minor did not intend to assert his privilege, the Supreme Court held at pages 383-384 that: "[W]hen, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege. The police did not so cease in this case, the confession obtained by the subsequent questioning was inadmissible, and, therefore, the admission of such confession was prejudicial per se and compels reversal of the judgment on all counts. (*People v. Randall, supra,* 1 Cal.3d 948, 958; and cases there cited.) The admission of this confession constitutes reversible error even though it was subsequently preceded by a knowing and intelligent waiver of the privilege, as we

[5]*Miranda v. Arizona*, 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

held under identical circumstances in *Fioritto, Ireland* and *Randall*, because: 'After the initial assertion of the privilege, the defendant is entitled to be free of police-initiated attempts to interrogate him. Any statements made by a defendant in response to such questioning cannot be characterized as voluntary.' (*People v. Randall, supra,* 1 Cal.3d 948, 958.)"

It is suggested that the holding in *Burton* be extended by this court to include a request to see his probation officer. This we decline to do.

While such an extension might, at first blush, appear logical, we believe a line must be drawn before a request for consultation with one's football coach, music teacher or clergyman, be deemed to invoke Fifth Amendment privileges. While we would draw the line even though there was "nothing in the way of affirmative proof that defendant did not intend to assert his privilege", *Burton, supra,* page 383, we find in the record before us the existence of a measure of such proof sufficient to factually distinguish *Burton* and support the lower court's action in so doing. Noting that *Burton* does not discuss *People v. Lara,* 67 Cal.2d 365 (cert. denied, 392 U.S. 945) we believe the following from that opinion is instructive:

"We cannot accept the suggestion of certain commentators (see 7 Santa Clara Lawyer 114, 127 (1966); 40 Wash.L.Rev. 189, 200-201 (1965)) that every minor is incompetent as a matter of law to waive his constitutional rights to remain silent and to an attorney unless the waiver is consented to by an attorney or by a parent or guardian who has himself been advised of the minor's rights. Such adult consent is of course to be desired, and should be obtained whenever feasible. But as we will explain, whether a minor knowingly and intelligently waived these

rights is a question of fact; and a mere failure of the authorities to seek the additional consent of an adult cannot be held to outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made."

"This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement. (See cases collected in Note, 87 A.L.R.2d 624.) Applying the 'totality of circumstances' test of *Gallegos*, such confessions have been held admissible when made by a minor of the age of fourteen,[9] fifteen,[10] sixteen,[11] seventeen,[12] eighteen,[13] nineteen,[14] or twenty.[15] As the court concluded in *State v. Carder* (Ohio 1965) *supra*, 210 N.E.2d 714, 719, after reviewing the facts surrounding the murder confession of a 16-year-old youth. 'Under this "totality of circumstances," for his statements to be inadmissible we would have to hold that any self-incrimination of a person under 18 years old is involuntary unless his parents or his attorney are present. We would also have to hold that such minor is not mature enough to make a voluntary confession or waive the presence of his parents or his lawyer during any conversation with the police. *This is not the law.*' (Italics added.)

Nor is it the law in California, where our courts uniformly follow the 'totality of circumstances' rule." (Fns. omitted.) (Pp. 378-379; 383-384.)

It appears that after having been told that he had a right to have an attorney but not his probation officer present,

the 16 year old minor, characterized by the trial court as not being a young naive individual with no experience with the courts, agreed to talk to the officer. We conclude that the "totality of the circumstances" affords sufficient "affirmative proof" of an intent to waive the privilege to support the trial court's conclusions in the instant case.

The orders appealed from are affirmed.

ALLPORT, J.

We concur:

COBEY, Acting P.J.

POTTER, J.

Appendix

Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1978
No. 334

78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petition for Certiorari Filed August 28, 1978

Certiorari Granted October 30, 1978

Westside Law Publishers Santa Monica, California 213/451-1714

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In the Supreme Court of the United States

OCTOBER TERM 1978
No. 78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 6, 1976 – Petitioner Kenneth Fare's petition filed in the Superior Court of the County of Los Angeles

(Juvenile Court). (CT 1.)[1]

February 9, 1976 – Respondent and parents advised of their constitutional rights; public defender appointed to represent respondent; respondent admits paragraph two (2) of the petition and denies paragraph one (1); court orders respondent be detained in juvenile hall. (CT 2.)

April 6, 1976 – Adjudication hearing commences. (CT 8.)

April 7, 1976 – Adjudication hearing resumed; respondent's motion to dismiss denied without prejudice; motion for mistrial denied. (CT 9.)

April 8, 1976 – Adjudication hearing resumes. (CT 10.)

April 9, 1976 – Adjudication hearing resumes; Mirandized transcripts of Robin K. J., original transcript of respondent and tape recorded statement of respondent, and "Arandized" transcript[2] of respondent (Exh. 18) marked for identification. (CT 11.)

April 12, 1976 – Respondent's motion for a mistrial denied; motion to suppress statements of respondent denied; petition filed February 6, 1976, found to be true in count I and not true in count II; respondent found to be a person described by section 602 of the California Welfare and Institutions Code; accelerated clinical study ordered given respondent at the probation officer's psychiatric clinic. (CT 12.)

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[1] "CT" refers to the Clerk's Transcript.

[2] Transcripts with references to other minors deleted pursuant to *People v. Aranda* (1965) 63 Cal.2d 518 [47 Cal. Rptr. 353, 407 P.2d 265].

May 10, 1976 – Court finds welfare of respondent requires that custody be taken from parents or guardians; court finds respondent would be benefited by reformatory educational discipline or other treatment provided by Youth Authority; court orders prior court order of camp placement terminated; respondent ordered committed to the California Youth Authority; respondent ordered to remain detained at juvenile hall. (CT 13-14.)

June 25, 1976 – Respondent's notice of appeal filed. (CT 15.)

January 24, 1977 – Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, filed. (Pet. for cert., App. B.)

May 30, 1978 – Opinion of the Supreme Court of the State of California filed. (Pet. for cert., App. A.)

Filed
February 6, 1976
Clarence E. Cabell
County Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
JUVENILE COURT

PETITION

In the Matter of
MICHAEL WAYNE CHRISTMAN Number
a minor. 466633-0440633 AC6-
IDC-ACT Active

Petitioner is informed and believes and therefore alleges, that MICHAEL WAYNE CHRISTMAN, hereinafter called minor, resides at 12232 Van Nuys Boulevard . . . Lake View Terras . . . California, and was born on 8-1-59 and was 16 years of age on August 1, 1975, and comes within the provisions of Section 602 of the Welfare and Institutions Code of California, in that:

Paragraph I: Said minor on or about January 19, 1976, at and in the County of Los Angeles, did willfully, unlawfully and with malice kill Robert Yeager, a human being; thereby violating section 187 of the Penal Code.

Paragraph II: Said minor, on or about January 19, 1976, at and in the County of Los Angeles, did willfully, unlawfully and by means of force and fear attempt to take personal property from the person, possession, and immediate presence of Marion Adam; thereby violating section 664/211 of the Penal Code.
The name and residence address of each parent and guardian of minor, known to me, is as follows:

Mother: Phyllis Kelly 12232 Van Nuys Boulevard
Lake View Terras, California
Stepfather: Alex Childs Same

The name and residence address of an adult relative residing within the country, or if there is no such person known, the name and address of the adult relative known to me to reside nearest to the court, is:

Minor was taken into custody by Los Angeles Police Department on 2-4-76 at 6:30 p.m. Minor is detained. The present whereabouts of minor is Central Juvenile Hall.

Therefore, petitioner respectfully requests that this minor be adjudged and declared a ward of the Juvenile Court and dealt with as such.

CLARENCE E. CABELL,
Acting Chief Probation Officer,
Petitioner

By [Signature]
S. BAILEY, IDC
Deputy Probation Officer

I certify under penalty of perjury that the foregoing is true and correct, according to my information and belief.

Executed on February 6, 1976
Court Date: 3-1-76, a.m.
School: None

Executed at Los Angeles, California

Signed
May 13, 1976

Date filed with Juvenile Court Clerk: February 6, 1976
SB/DLJ

Para. I sust. – Para II dism.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
JUVENILE COURT

Date: April 12, 1976 Dept. 203
Judge Bonnie Lee Martin
Probation Officer: R. Hanaway
Deputy Clerk Wm. E. Wilkins
Deputy Sherif T. Holeman
Reporter: K. Kearney

IN THE MATTER OF
CHRISTMAN, MICHAEL WAYNE, 16 yrs.,
a minor
No. 466633 0440633 AC 6 IDC ACT
APPEARANCES: Minor, DDA S. Levitin, Attorney P. RICE, DPD

ADJUDICATION PROCEEDINGS: The 602 petition filed on 2-6-76 is read to those present, and the minor and any parent or guardian or adult relatives are informed of their constitutional rights.

SWORN AND TESTIFYING: Charles Christensen

Counsel for minor motions for a mistrial is denied. Minor's motion to suppress the statements of minor is argued and the court denied the motion.

The court finds:

The petition filed 2-6-76 as to Paragraph I is true, and the petition is sustained, except that Paragraph II is found not to be true/dismissed.

Minor is a person described by Section 602 of the Welfare and Institutions Code.

The court orders:

Minor shall remain at Juvenile Hall pending the next hearing.

CONTINUED TO: May 10, 1976, 9:00 A.M., Dept. 203 for Disposition.

Petitioner's Exhibits #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #17, #18, previously marked for identification only are admitted in evidence. Petitioner's Exhibit #19 (yellow document signed by Christman) is admitted in evidence.

***An accelerated clinical study is ordered given minor at the probation Department Psychiatric Clinic.

602 petition filed on 4-5-76 is set for adjudication on April 23, 1976 at 8:30 a.m. in Department 201. (DA is ordered to subpoena all necessary witnesses. Disposition of the 2-6-76 petition is continued as indicated . . .

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
JUVENILE COURT

Date: May 10, 1976

Dept. 203

Judge Bonnie Lee Martin
Probation Officer R. Hanaway
Deputy Clerk Wm. E. Wilkins
Deputy Sheriff T. Holeman
Reporter N. Miller

IN THE MATTER OF

CHRISTMAN, MICHAEL WAYNE, 16 yrs.,
a minor

No. 466633 0440633 AC-6 626

APPEARANCES: Minor, mother, Attorneys S. Cooley, DA/P Rice, DPD

FINDINGS AND ORDER OF REFEREE
(DISPOSITION #1)

Disposition proceedings of petition filed 2-6-76: The Court having read and considered the social study filed herein and said report is admitted into evidence by reference.

***Sworn and testifying: Anthony Apodaca, Charles Christensen, Michael Christman, Phyllis Kelly.

The court finds:

Welfare of minor requires that custody be taken from parents or guardians.

The Court finds that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefitted (sic) by the reformatory educational discipline or other treatment provided by the Youth Authority.

Order of camp community placement heretofore made on 1-13-75 is terminated.

The Court orders and adjudges that:

Minor remains a ward of the court under section 602 of the Welfare and Institutions Code.

Minor is ordered committed to the California Youth Authority.

Pending said order, Minor is to be: Remain at Juvenile Hall pending trans. to CYA; the continuance date of 7-12-76 is advanced and vacated.

Matter is continued to: Nonappearance calendar of 5-24-76, Dept. 203 for 15 day review; court advises minor and parties of appeal rights.

***The probation officer is directed to transport the minor to the reception center of the Youth Authority on the date designated by it.

Approved: **BONNIE LEE MARTIN**
Judge of Juvenile Court

Dated: May 10, 1976

This order was entered: May 13, 1976
John Corcoran, Acting County Clerk and
Clerk of the Superior Court

***Pursuant to 502 W&IC, the Court finds that the protection of the public as well as the rehabilitation of the minor will require long term commitment for educational and vocational training and to restructure his tendency for assaultive behavior, further the Court finds that the parents or guardian is incapable of providing and has failed to provide proper training and supervision for the minor.

***The Court further orders the reporter (Nickie Miller) to transcribe Court's statement in minor's case, and reasons for commit-tment, and place original copy in the file and send one copy to the California Youth Authority.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
JUVENILE COURT

In the matter of — Court No. 466633
CHRISTMAN, MICHAEL WAYNE — COMMITMENT TO
(Name of Ward) — THE YOUTH AUTHORITY

(Juvenile)

To the Youth Authority of the State of California.

The Court finds that:

1. The person named in this matter is described by Section 602, Welfare and Institutions Code, and has been adjudged a ward of the court, in that the petition filed 2-6-76 (Paragraph I) is sustained.

2. This person was born August 1, 1959.

3. The mental and physical condition and qualifications of this person are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority.

THEREFORE, the person named in this matter is hereby committed to the Youth Authority of the State of California.

Dated: May 10, 1976 — BONNIE LEE MARTIN
Judge

CERTIFICATION

I hereby certify that the foregoing is a correct copy of the original on file in my office.

Dated: May 13, 1976 — JOHN J. CORCORAN,
(Acting Clerk)
By A. GARCIA,
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES SITTING AS A JUVENILE COURT

DEPARTMENT NO. 203
HON. BONNIE LEE MARTIN, JUDGE

In the Matter of

(1) Michael Wayne Christman,	(1) No. 466633
(2) Michael Cooke,	(2) No. 503635
(3) Robbin Jerro,	(3) No. 494734

all persons under the age of 18 years.

PARTIAL REPORTER'S TRANSCRIPT OF ADJUDICTION HEARING CONDUCTED ON APRIL 9 AND APRIL 12, 1976[3]

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[3] (Reporter's Transcript page 355, line 4, through page 401, line 27.)

[355] STANLEY L. MILLER,
recalled as a witness on behalf of the Petitioner, having previously been sworn, testified further as follows:

DIRECT EXAMINATION (continued)
BY MR. LEVITIN:

Q. Sergeant Miller, during the course of your investigation, did you have a conversation with defendant Michael Christman?

A. Yes, sir.

Q. And when and where did that conversation take place?

A. That occurred on February 4, 1976, at Van Nuys Police Station.

Q. During the course of that conversation, before initiating the conversation, did you advise defendant Christman of his constitutional rights?

A. Yes, sir.

Q. What did you tell him in that regard?

A. I advised defendant Christman from a card, L.A.P.D. Form 15.30.

A. Did you read that card to him?

Q. Yes, sir, I did.

Q. Would you read it to us now in the same manner that you read it to him?

[356]A. I advised Michael Christman:

'You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law.

'You have the right to speak with an attorney and to have the attorney present during questioning.

'If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.'

I asked Michael Christman, 'Do you understand each of these rights as I have explained them to you,' and he stated, 'Yeah.'

I said, 'Do you wish to give up your rights to remain silent,' and he said, 'Yes.'

I said, 'Do you wish to give up your right to an attorney, have him present?'

At that time, he asked if he could speak to his probation officer. I advised him he had a right to have an attorney present. I would not call his probation officer, and he stated he would talk to me without an attorney at that point.

Q. All right, now, were there any other persons besides yourself and defendant Christman present during this conversation?

A. Yes, Investigator Steinauer.

Q. And this conversation took place at the Van Nuys Police Station, one of the interview rooms?

[357]A. Yes, sir.

Q. And was that conversation recorded?

A. Yes, sir.

Q. And did you cause or procure a transcript to be prepared of that recording?

A. Yes, sir.

Q. And have you reviewed the transcript and the recording?

A. Yes, sir.

Q. And is the transcript a true and correct copy of the recording, insofar as you are able to tell?

A. Yes, sir.

MR. LEVITIN: I'd like to have marked as People's next in order, People's —

THE COURT: 16, Petitioner's 16.

MR. LEVITIN: — this transcript of Michael Christman bears the tape number 61725.

Can I take a moment? Can I just have a moment to ask the witness something off the record?

THE COURT: Sure.

(Off the record discussion.)

MR. ALARI: Your Honor, I am going to show the portion of the transcript — Jerro to defense counsel to review before it goes to you.

MR. LEVITIN: I will mark the original People's 16 with the court's permission?

THE COURT: Petitioner's 16.

Q. BY MR. LEVITIN: Let me show you this document

[358] which is marked Petitioner's 16. Would you examine that for us, please, at this time?

Could you tell us whether or not that is the transcript of the recording to which you have referred in your testimony and in answer to my questions?

A. Yes, sir, it is.

MR. LEVITIN: At this time, I'd like to offer that into evidence, Your Honor, Petitioner's 16.

MISS RICE: Your Honor, there would be an objection. There are — I have personally listened to the tape and reviewed transcripts at the same time. There are a number of items marked 'unintelligible' I believe are intelligible with some effort. There are mistakes in the transcript. The most crucial points being the first few pages of the transcript. Perhaps counsel and I can arrive at a stipulation. I believe that it or a corrected transcript, I have made my own corrections from a rather laborious listening to the tape.

THE COURT: Do we have a problem with the introduction of the tape itself — then simply receive the transcript as a reference aid to the court.

MR. LEVITIN: Well, what I was going to provide the court was an 'Arandized' version of the orginal, the document I have just entered, just proffered to read.

This is the first counsel has advised me that there is any difficulty. I wish counsel would have done so earlier.

MISS RICE: I would assume we would be hearing the tape. I think there is something we can work out. The problems are basically in the first part.

[359]MR. LEVITIN: Well, I am willing to do that, of course.

THE COURT: Now, are there any so-called Aranda problems? This relates again to foundational information, does it?

MISS RICE: Yes, this is all as relates to foundation. I don't believe there are any Aranda problems on any foundational pages.

MR. LEVITIN: I think we can, with safety, play the tape.

THE COURT: Why don't you simply offer that portion of the tape and offer the — just the first few pages of the transcript to the court as a reference, and I will follow within. We can all three follow the tape against the transcript and make any corrections.

MR. LEVITIN: I might indicate to the court in going throught the transcript, it was not necessary to Arandize anything until page 11, and it is approximately the middle of page 11, so I think we can safely do that.

MISS RICE: I think we can.

THE COURT: All right, do you have the tape present, then?

MR. LEVITIN: Yes.

THE COURT: May we, counsel, may we have this tape marked and identified for the record as Petitioner's 17?

All right, does this have a number and date?

MR. LEVITIN: It bears the number Reel number 61725, subject Michael Christman.

THE COURT: Also for the record, do you have the approximate lines or revolutions on the tape marked? In other words, we are

[360] playing up to which number?

MR. LEVITIN: I wouldn't know.

THE COURT: All right, we can designate that when we complete it at the point where you stop it. The record will reflect we are starting it from the beginning.

MR. LEVITIN: Right.

THE COURT: Before you start, the court would like to have a transcript at the bench.

MISS RICE: Your Honor, there are some portions of the transcript that are foundational and then other portions of the transcript get into other areas other than foundation.

THE COURT: Well, can we stipulate at this time that the court received the first — how many —

MISS RICE: Well, I think we are going to have to block —

MR. LEVITIN: I have a copy of the Aranda —

MISS RICE: No, It is not an Aranda problem.

MR. LEVITIN: I suppose that I should indicate to defense counsel that the original has not been Arandized, so I would not be presenting it to the court. The one that has been Arandized is this other copy.

THE COURT: Let's mark this the Arandized copy of the transcript purporting to be a transcript of the tape recording of Petitioner's 17, and let's mark that Petitioner's 18, Arandized version.

MR. ALARI: I take it, should there be any slip-ups, the same precautions the court held regarding the other tape is contained in this tape as well as to their use?

[361]THE COURT: Well, at this point, as I understand it, we are offering only — Petitioner's offering only foundational statements, no substantive statements, and

would be received only as to Christman.

MISS RICE: Your Honor, could we have a recess at this time? I think we just need a quick run-through on the tape. I don't think it is going to —

THE COURT: You want to listen to the tape again?

MISS RICE: Just to decide — there are a few spots we are going to need to stop the tape. It is not complicated. We just need to take a practice run, so to speak.

THE COURT: What about 10 minutes?

MISS RICE: That should do it.

(Recess.)

THE COURT: We will resume. All counsel are present, minors are present.

Have we come to an agreement on that portion of the Petitioner's 18 which may be submitted to the court for reference in listening to the tape recording marked Petitioner's 17?

MISS RICE: I am sorry, Your Honor, what we are interested in is the first through line 24 of the second page. We will then start again on page 3, line 3, and then there is a portion later on in the transcript. Due to the fact it is a very short portion and will be difficult to find on the tape, we are going to enter into a stipulation. It is only two lines. That's page 14.

THE COURT: Lines —

[362]MISS RICE: Lines 13, 14, 15, and 16.

THE COURT: Lines 13 through 16?

MISS RICE: Yes.

Your Honor, I would indicate at this time that I am intending on calling a witness on this issue. At 2:00, I told the witness who called in, I said that I would not be needing him this afternoon. I assume that Monday morning would be an appropriate time to instruct that witness to be back. The court indicated we would be adjourning at 4:00.

THE COURT: All right. I don't believe the court

has received yet the copy of Petitioner's 18.

Now, it's the court's understanding that we are going to listen to the tape recording which corresponds to page 1 and page 3 as indicated, but not to lines on 14.

MISS RICE: Your Honor, there are some additions that I believe the district attorney would agree to that are not contained in the transcript. Perhaps we should give them to the court at this time.

Line — On page 2, lines 4, transcript reads: "Yeah, I want to talk to you." Should read, "Yeah, I might talk to you."

THE COURT: All right, may we correct by interlineation?

MR. LEVITIN: Petitioner so stipulates.

THE COURT: "Yeah, I might talk to you."

MISS RICE: Line 10 —

MR. LEVITIN: What page?

MISS RICE: This is page 2. "How I know you guys won't pull no police officer in and tell me he is an attorney?"

[363]MR. LEVITIN: So stipulated.

THE COURT: Will be amended by interlineation on line 10, page 2, to read: "How I know you guys won't pull no police officer in and tell me he is an attorney?"

MISS RICE: Yes. Line 1 is then a repeat of line 10.

Your Honor, there may be one or two words different in the repeat, but it's in substance a repeat.

Line 13, "Your probation officer is Mr. Christianson." Line 15, "Well, I am not going to call" — the word "him" is not on the tape. It is really, "Well, I am not going to call Mr. Christianson."

Line 24, "Yeah, I want to talk to you."

MR. LEVITIN: In other words, the lead-in words are unintelligible, and the "I want to" —

THE COURT: Those changes have been made by

the court by interlineation.

MISS RICE: We began at page 3, line 3.

THE COURT: And it goes to what?

MISS RICE: Goes to line 11 or 13, I am not sure what I indicated to the court. I stopped at line 11.

THE COURT: And then as to page 14, this is simply going to be a stipulation rather than listening to the tape, line 13 through 16.

MISS RICE: Your Honor, "Hey, man," something unintelligible, "Tell nobody what I have been telling you, man." The questioner would be the investigator — something unintelligible, "No way, no way," and then, "I am going to get my coffee."

[364]THE COURT: All right. Does that complete the preliminary matters on foundation as far as the petitioner's concerned, Mr. Levitin, or do you have anything additional you want to ask Sergeant Miller concerning foundation for Christman's statement?

MR. LEVITIN: That's all petitioner offers with regard to the foundational regard to Christman.

THE COURT: You want to wait and call the witness on Monday regarding the waiver?

MR. LEVITIN: Yes, Your Honor. If I did call him now, he wouldn't be here until fairly late.

THE COURT: I don't believe — do you want to proceed with argument on the Jerro statement at this time after the court's had an opportunity to read it?

MR. ALARI: I did want to after you have read it, Your Honor.

THE COURT: All right, we will let Sergeant Miller step down at this time.

Let's see again, on Jerro, page — what to what, counsel, am I to read?

MR. ALARI: From page 1 to 28. You have the full

text of it, line 1 through 28, bottom half of 28 has been blackened out. The petitioner represents it has been Arandized.

MR. LEVITIN: I think in addition to the petitioner's representation, it has also been circuited among defense counsel.

MISS RICE: I have not read it.

THE COURT: Well, it is available. Do you have a copy?

MISS RICE: I have read it. I have not read the Arandized

[365] version. I am familiar with it.

MR. ALARI: If you want to take more time, Your Honor, for a recess, it would be agreeable.

THE COURT: 28 pages, I think we can just sit here for a second and look through it together and then we will hear argument on it.

(Court reading transcript.)

THE COURT: The court has completed reading. This should be marked Petitioner's 18, I think, the Arandized version. The original, unexpurgated version was marked Petitioner's 15, was it not, counsel? Do you have the complete original statement?

MR. KAUFMAN: My records indicate 15 was Jerro's transcript.

MISS RICE: I have 15 was the Jerro transcript.

MR. LEVITIN: 16 was the original Christman transcript.

THE COURT: Well, I am now reading the Arandized version of the Jerro transcript, 15 being the original one. Do you have the original Jerro statement marked 15?

THE CLERK: Jerro, 15.

THE COURT: Where is that?

THE CLERK: And 18 is supposed to be —

THE COURT: Well, you have mismarked it. This is Petitioner's 18.

THE CLERK: That's this one.

THE COURT: It's the Arandized version of Jerro. If you will give the clerk — you didn't give him the original Jerro statement marked Petitioner's 15.

[366]All right, court has completed reading Petitioner's 18, which is submitted, the Arandized version of the transcript of the Jerro transcript up to page 28.

MR. ALARI: Is the court prepared to grant a motion to suppress the confession at this time?

THE COURT: Let me ask Mr. Levitin, is there anything further that follows before any substantive statements are made as far as a waiver is concerned?

MR. LEVITIN: No, Your Honor.

THE COURT: I don't find any waiver in here, counsel. Do you want to argue it?

MR. LEVITIN: We will submit it.

THE COURT: Motion is granted to suppress statement made by Jerro.

MR. ALARI: Thank you, Your Honor.

MR. LEVITIN: Your Honor, counsel has asked me to make a representation to the court, which I am agreeable to doing, that that is the extent of the evidence that we have against defendant Jerro, and I think counsel has a motion to put before the court based upon that representation by the petitioner at this time.

MR. ALARI: There would be an 1118 motion to dismiss both counts against the minor Jerro.

THE COURT: Any argument, Mr. Levitin?

MR. LEVITIN: I have none to make.

THE COURT: Granted.

MR. ALARI: Thank you, Your Honor.

THE COURT: All right, is there any other matters pending

[367] against the minor Jerro at this time? Is he to be detained on any other matters or is he wanted on any other warrants?

MR. ALARI: Not to my knowledge.

MR. LEVITIN: Minor is not active on any probation.

THE COURT: Is there a suitable placement order? What's the last order?

Well, while we are proceeding with the other matter, counsel, I will ask Mr. Hanaway to check back, and if he is active on probation, give the probation officer a call.

MR. HANAWAY: No, Your Honor, he is not under — he is just home on probation.

MR. ALARI: May I be permitted to withdraw at this time?

THE COURT: Very well.

MR. ALARI: Very well, Your Honor.

THE COURT: Is there anything further — oh, there is nothing further on the Christman statement until the witness is called back, is that correct?

MISS RICE: Yes.

THE COURT: You want to recall Sergeant Miller to the stand and let's proceed on direct examination and other evidence?

MR. LEVITIN: Your Honor, the only other testimony that I intend to elicit from Sergeant Miller at this time is with regard to substantive matters contained in Mr. Michael Christman's statement, so —

THE COURT: Well, at this time we can proceed with some other items?

MR. LEVITIN: There is nothing else we have to present at

[368] this time, Your Honor. The only other items we talked about presenting on Monday, substantive item with regard to Mr. Christman's statement, and that's the extent of it.

THE COURT: Other than Sergent Miller's previous testimony concerning the Datsun, you have no other evidence on the car?

MR. LEVITIN: Just — I intend to direct the court's attention to the petition against Mr. Christman and the statement, I believe of Mr. Alex Childs that appeared here in court, that he was in fact the stepfather of Michael Christman. I believe that occurred on one of the first days of trial.

THE COURT: I wasn't — I didn't have the photograph before me. It hasn't been offered. Have you established whether or not the Datsun is the same license number?

MR. LEVITIN: I am sorry. The court doesn't have the benefit of knowing that the photograph of the Datsun portrays the license number affixed to the Datsun.

I would suggest that we can adjourn at this time.

THE COURT: All right, we will adjourn until Monday morning at 9:00 a.m. I want to know from the Jerro's probation officer if there is any — are there any violations of probation or anything else, so we can release the minor?

MR. KAUFMAN: Your Honor, can I be heard for just a moment. I am supposed to start a jury trial on Monday in Van Nuys.

THE COURT: You better call him.

MR. KAUFMAN: I have already given the District Attorney's Office that indication. Does it look — what we are aware of — we

[369] might complete this matter on Monday in the afternoon?

THE COURT: According to District Attorney's representation, they have no other evidence except Christman's — the offer of Christman's statement. We can't proceed with that until Miss Rice has her witness here.

MR. LEVITIN: I don't know what defense matters are.

THE COURT: I don't know how many witnesses

you have on defense — pretty good indication that the petitioner's evidence should practically be completed —

MISS RICE: Your Honor, I think that if we could argue the statement Monday morning, that I would be in a position at that time to know exactly what my position would be. I can't represent to the court at this time how long it would take. I think that the court's ruling on the statement will be pretty much — will dispose of the case.

THE COURT: Well, it looks like it might be a good chance it will be completed Monday.

All right, we will adjourn at this time with the exception of the Jerro matter, he will have to remain in court until — in the courtroom until we have checked this situation out. The other minors and parents are ordered to return Monday morning.

(At 3:46 p.m., a recess was taken until Monday, April 12, 1976, at 9:00 a.m.)

[370]
LOS ANGELES, CALIFORNIA,
MONDAY, APRIL 12, 1976; 9:50 A.M.
DEPARTMENT 203
BONNIE LEE MARTIN, JUDGE

Appearances as heretofore noted.

THE COURT: We will resume in the companion matters of Michael Dennis Cooke and Michael Christman. Record will reflect both minors are present with counsel, third minor, as to Jerro, petition has previously been dismissed pursuant to an 1118 motion.

MR. KAUFMAN: Your Honor, if I may be heard just briefly? The end of last week the court ruled on my motion to keep statements made by Michael Cooke and things were coming quite fast and furious at the time. At this time, after reviewing all of this evidence I have, I would move for a dismissal based on the reports that Michael was not afforded an opportunity to have a separate trial, nor was I given an opportunity to prepare a transcript of the two tapes that the court had an opportunity to listen to.

I believe that the fashion under which I was forced to present the evidence as far as the tape was concerned was extremely prejudicial to my client, and if I had an opportunity to present it by way of transcript which was an Arandized version, it would have been sufficiently to his benefit to do so. I would make the motion for the record.

THE COURT: Motion for mistrial is denied. You may proceed, Mr. Levitin.

[371]MR. LEVITIN: Your Honor, I think we are prepared to argue the admissibility of the Christman statement at this time.

MISS RICE: Your Honor, I would like to call Charles Christiansen on that issue.

[371] THE COURT: Very well.

CHARLES P. CHRISTIANSEN,

called as a witness on behalf of the minor Christman, was sworn and testified as follows:

THE CLERK: You do solemnly swear that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Take the stand and state your full name for the record.

THE WITNESS: Charles P. Christiansen, C-h-r-i-s-t-i-a-n-s-e-n.

DIRECT EXAMINATION

BY MISS RICE:

Q. Mr. Christiansen, what is your occupation?

A. I am a probation officer for the County of Los Angeles.

Q. And what is your relationship to Michael Christman?

A. Michael was assigned to me after he finished a stay in probation camp.

[372] Q. And when did you first get to know Michael?

A. I met him first approximately April of last year, may have been March. Officially, Michael was assigned to me when he graduated from camp last May.

Q. How long have you been with the Probation Department?

A. Eleven years today, as a matter of fact.

Q. Now, what kind of supervision was Michael under with you since he was released from camp?

A. Could you —

Q. What is the nature of the program that Michael is in with you.?

A. I am in Intensive Camp After-care Program, which accepts boys, only boys from probation camps at the time of their completion of their program.

Q. Now, approximately how often during the time that Michael was assigned to you, did you see him?

A. That would vary, given a situation and circumstances at that moment. It hasn't been — there has never been any time where there has not been a contact any longer than two weeks. Frequently with Michael, the contact has been numerous times in one week, and on some occasions it was all day.

Q. Now, have you counseled Michael as to family problems?

A. Extensively, yes.

Q. What have you instructed him to do in relation to you in regards to family problems?

A. At any time he has a concern with his family, that [373] he has a concern for his mother or stepfather, has a concern with what he is doing or some change that's occurring at that time, I directed him to contact me right away, if not to discuss it, to at least keep me informed of what was going on.

Q. Now, as to any problems Michael might have with regards to police, what have you — getting into law violations — what have you instructed him in that regard?

A. Similar type of instruction, except a little bit stronger. I have instructed Michael that at any time he has a police contact, even if they stop him and talk to him on the street, he is to contact me immediately.

Q. And do you recall specifically instructing him or having a conversation with him about that? Have you ever — Let me rephrase that. Have you ever had occasion to criticize him or get angry with him for not following that procedure?

A. Could you rephrase that? Has there been a situation —

MR. ALARI: Has Michael ever had a contact with the police and not contacted you?

A. Yes, I believe in November — it may have been the latter part of October — there was a police contact that resulted from a possession of marijuana charge on school grounds, and Michael didn't contact me right away following that. When I did finally find out about what had happened, it was the school who contacted me, and I was somewhat — I bawled Michael out for not getting in touch with me and informing me himself of what had happened.

Q. And was that in November?

[374]Q. I'd have to look at the matter again through my books, but it was either the last part of October or beginning part of November.

MISS RICE: Thank you, I have nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. LEVITIN:

Q. Now — thank you, Your Honor — isn't it true, Mr. Christiansen, the reason you want him to contact you in case there is any difficulty with the family is so that you can counsel him and help him so that these times of conflict are avoided in the future?

Q. I am sorry, I didn't —

THE COURT: Please re-read the question.

(Question read.)

A. That's yes or no, and partially correct.

Q. BY MR. LEVITIN: And you also have the additional idea, I suppose, to help him be able to handle conflicts of that type, is that correct?

A. That would be the other part of it, not only do I want him to learn to deal with it in the future, but at the

present time accepting that he is going through problems. I want to be there so that I can also instruct and teach him how to handle it, and also how to resolve the current situation.

Q. And isn't it true that that's very much the same type of motivation you have in asking him to contact you in the event that he's contacted by a police agency?

[375]A. Well, again, that's — it's not a straight answer. It's a yes and no. That's partially correct.

Q. What are your other purposes?

A. Well, it's also that I want to find out from him as his own responsibility in contacting me to inform me of what's happened. That's part.

Q. You think this will assist him in learning to face up to his responsibilities, is that correct?

A. That's true. There are other reasons. Also, many times the kids don't understand what is going on, and what they are supposed to do relative to police, and relative to myself.

Q. Now, you feel that you can assist them in making those things clear to both themselves and to the police agency, if possible?

A. Ordinarily the police agency understands. Sometimes, the boys don't and sometimes they do understand what they're supposed to be doing.

Q. Have you ever told Michael if he is contacted by a police agency that he should "clam up" or anything such as that?

A. I haven't used that terminology.

Q. What type of terminology have you used?

A. I have recently instructed him, especially relative to myself being that I also am a peace officer on some occasions, and also with other — on the current matter?

Q. I am talking about previous incidents before this.

A. That he is not supposed to talk to police?

Q. Have you ever told him he is not supposed to talk to
[376] police?

A. Not in those words. What I have instructed —

Q. You don't see — take that as part of your responsibility as a probation officer, Mr. Christiansen?

A. What I have instructed is that he is not to go and admit openly to an offense, that he is supposedly to get some type of advice from either his parents or a lawyer. That's pretty much true with all the boys. Michael isn't an exception to that.

MR. LEVITIN: I have no further questions.

THE COURT: Any redirect?

MISS RICE: Nothing.

THE COURT: You may step down, Mr. Christiansen.

Miss Rice, Do you have any further evidence?

MISS RICE: No, on that issue. I would reserve for argument.

THE COURT: In connection with the foundation?

MISS RICE: Yes.

THE COURT: Petitioner have any additional evidence on foundation?

MR. LEVITIN: None, Your Honor.

THE COURT: Arguments?

MISS RICE: Your Honor, I believe that the case law as to what amounts to an invasion of one's Fifth Amendment Miranda rights in this case would indicate that Michael is asking to speak to a probation officer. It is really an invocation of his Fifth Amendment rights under Miranda.

Now, the case of Miranda of course holds that if an
[377] individual indicates in any manner at any time prior to or during questioning that he wants to remain silent, then the interrogation must cease. Of course, in Supreme Court — People vs. Burton amplifies that as relates to minors.

Now, in that case, that case is very often referred to in terms of asking for a parent example equivalent to asking for an attorney; however, that isn't exactly what the court held The court held on the Fifth Amendment grounds that in that case the minor asked to see his parents. The court held that by asking to see his parents was really invoking the Fifth Amendment privilege. It was showing an unwillingness to participate or continue in the interrogation and showed that he did not want to discuss the case fully and completely at that time.

Now, the Burton case relies on — in a very large part on the case of *People vs. Randall*, which is 1 Cal.3d 948, and in that case the court held that a phone call to an attorney demonstrated a desire to invoke the Fifth Amendment showed an unwillingness to talk at that time, and that was crucial in that case.

Now, Randall went further to state, "Suspect may indicate a desire to invoke the privilege by means other than an expressed statement to that effect." You don't have to say, "I do not want to talk to you," or "I do not waive my rights." Any conduct which reasonably appears inconsistent with the present willingness on the part of the suspect to discuss his case freely and completely with the police at that time must be held to amount to an indication of the Fifth Amendment right, and
[378] in this case we have Michael who is not asking for his parents, not indicating a desire to stop talking by asking for his father or his mother; however, he is asking for his probation officer.

I ask the court to take judicial notice of the fact that Michael is a ward of the court. Custody and control has been taken away from the parents and placed in the hands of the probation officer. I think the probation officer has indicated that he has a close supervision relationship with Michael. He is acting as Michael's guardian. He is counseling him on a family situation, which is bad. In this

case, as in the Burton case, he is asking for someone to help.

Now, I would refer the court to the transcript. I believe it is —

THE COURT: Just while the court's listening to argument, give me the Burton citation again, counsel, Court has read it, but I would like it.

MISS RICE: Burton, 6 Cal.3d 375.

THE COURT: All right, you may proceed.

MISS RICE: The court has, of course, held in a number of cases — there is a line of cases, they are cited in Burton — that the types of behavior, the types of indication that can be given other than express statements, and in *People vs. Ireland*, the defendant was in the car on the way to the police station. This is before he had even been advised of his rights. He said, "Hey, call my parents to get me an attorney." That's the only statement he made after he expressly waived his rights and made a statement. [379]The court held that particular statement, even though it wasn't an interrogation situation, it was earlier, "Tell my parents to call an attorney," At that point, he indicated that he did not want to sit down and freely and voluntarily discuss the situation, and of course, Fioritto, which is 68 Cal.2d 714. It was a situation where he refused to sign a written waiver, was confronted with co-defendants at a later time. Well, then, following that, made statements and fully waived his rights, but that was initial failure to waive. He then, after the confrontation, changed.

Now, the Randall case is very specific as to the protective measures of Miranda of what they mean, and what they're for, and to strictly limit the manner in which a suspect may assert the privilege, or to demand that it be invoked with unmistakable clarity, resolving any ambiguity against the defendant would subvert the protective features of Miranda.

The Burton case is dealing with a minor as opposed to an adult. I think the language of Burton is very constructive as to what the court meant when it held that calling or asking for one's parents is an invocation of a privilege. Court refers to it as a cry for help.

Minor is confronted with an interrogation situation. He is there with the police. He reaches out for the only person he can think of, which is that case were the parents, and the court states:

> "It appears to us most likely and most normal that a minor who wants help
>
> on how to conduct himself with the police and wishes to indicate that he does not want to proceed without such help would express such desire by requesting to see his parents. For adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents, but it would severly restrict the protective devices required by Miranda in cases where the suspects are minors if the only call for help which is to be deemed an invocation of the privilege is the call for an attorney. It is fatuous to assume that a minor in custody — "

Your Honor, I don't have the exact pages of the Xerox, and I don't have the page numbers to refer the court to which the fifth page is from.

THE COURT: Do you have a headnote?

MISS RICE: Yes, it is under 2. It is the second paragraph under 2 —

> "fatuous to assume that a minor in custody will be in a position to call an attorney for assistance, and it is unrealistic to attribute no real
>
> [381] significance to his call for help from the only person to

whom he normally looks — a parent or guardian."

In this case, the guardian is Mr. Christiansen. He is the representative of the Probation Department. This minor is a ward of the court. Mr. Christiansen is the adult to whom he looks for help. That's who his custody and control has been placed in by the court.

The court also states, "It is common knowledge that this is a normal reaction of a youthful suspect who finds himself in trouble with the law."

I think that the situation where a youth in trouble with the law who's been counseled by his probation officer, "Contact me when you are in trouble — always contact me," and who in fact has been bawled out by his probation officer when he didn't follow that procedure, and in the transcript, I think it is quite significant. We look on page 2. "Do you want to give up your right to have an attorney present here while we talk about it?" Immediate response, "Can I have my probation officer here?"

He wants someone he can trust, and the officer says, "Well, I can't get your probation officer. You have a right to an attorney," and at that point he repeats it. That was the part that was marked unintelligible. "Well, how do I know you won't bring in a policeman and tell me he is an attorney?"

In other words, "I can't trust you. I can't trust you to bring me someone and say he is an attorney that's not a [382] police officer."

Now, the case of *Bryan vs. Superior Court*, which is 7 Cal. 3d 575. The court discusses the relationship of the probation officer to a probationer, and in that case, that was a Juvenile case holding that statements made by a minor to a probation officer cannot be used against the minor in court, and the court discusses the very, very — virtual importance of a closed confidential relationship of the minor to the probation officer in a Juvenile Court

process, and states that "These rules for confidence shall implement the beneficial purpose of a probation interview." The court discusses the protective — he uses the words "protective and rehabilitative philosophy of Juvenile Court law;" that if admissions to a probation officer were admissible against a juvenile in court, then that would discourage candor and contrition and would subvert the confidential relationship of a probationer, a juvenile and the Probation Department.

The Probation Department stands in a position of parens patriae with the juvenile in this case. We have Mr. Christiansen who is a guardian assigned by the court as Michael's guardian.

In addition, I believe that he is a counselor. He counsels Michael. He has counseled him on other occasions. He has had him in his office and at no time has more than two weeks gone by. He said often it's been as many times as three or four times a week, and his job, his duty as guardian is to counsel Michael.

I would submit that asking for — asking for his [383] probation officer, and in this case according to the transcript it is a specific person he wants. The officer goes on. Your probation officer is Mr. Christiansen, and he states, yes, they knew who the probation officer was. This wasn't just some obscure notion. He wanted someone there that he could trust. He couldn't trust the police, or he didn't feel he could trust the police to give him someone who was an attorney, but he did know that he could trust Mr. Christiansen, just as in the Burton case, the minor could trust his parents, and he had a confidential relationship.

I submit that the probation officer was somewhat in the position of an attorney, and significant that it comes up in the interview at exactly the time that an attorney is asked for. His response is he doesn't answer the questions,

if he gives up the right to have an attorney. He says, "What about my probation officer," and I think as an adult who counsels, that in the eyes of the minor the probation officer in a counseling relationship, when he is in trouble with the law adults are told over and over by their attorneys, "If you get in any trouble, call me immediately; call my exchange; call me." This is always what adults are told.

In this case, this minor was told by his probation officer, "When you are in trouble, call me." and that's just what he did. He made a cry for help every bit as strong as the cry for help discussed in the Burton case, and in this case, this minor apparently is not as close or as trusting of his parents as he is with his guardian, and with the Probation Department representative, Mr. Christiansen, and I think it is

[384] clear that when he asks for his probation officer, it is indicative of the fact that he didn't want to go on and talk — went through much discussion, "Well, you can talk to him later."

The point was Michael didn't want to talk at that time, and according to Randall, the important factor is that any conduct which reasonably appears inconsistent with the present willingness participation of the suspect to discuss his case freely and completely with the police is an invocation.

I submit that asking for his probation officer was such an invocation. It was the duty of the police to cease interrogation at that time.

The Burton case states that, "The petitioner has the burden of affirmatively showing that that was not the intent of the minor." In that case, the petitioner — the case ultimately was in adult court — was the People's argument that the request did not give clear notice that the minor was asserting the Fifth Amendment right, since the request could have been for many purposes. The court rejected

that, rejected that statement, said that that argument had already been rejected in Randall; that the People had the burden of affirmatively showing that that was not the intent and the second argument put forward by the People in that case was that because the request occurred before the rights were given, that the police wouldn't understand it was as in Burton, minor asks for his parents, was then advised of his rights, and then a statement was made. He stated that the police couldn't be expected to understand that his request for parents was a request to remain

[385] silent. Court dismissed that there was no merit to that.

In this case, we have an even stronger indication he asserted his desire to invoke the privilege. In the midst of questioning, the request was made at exactly the moment when he was asked if he wanted an attorney, and his immediate response was, "I would like the probation officer. Can I have my probation officer here," a specific person, his legal guardian.

I submit to the court that the request almost exactly on point with the Burton case requesting his probation officer. I think it is even stronger than the Burton case in that it follows immediately by asking if he will give up a right to have his attorney present, the fact that he obviously did not believe that he could put any faith in the adults he was with.

On page 3, there is a statement about, "Well, we don't always play fair, do we," and he goes on to say, "No, sir." Then the whole line of discussion along there is that it's obvious that the only person he feels that he can trust, the only adult that he can reach out for help is Mr. Christiansen. He asks for Mr. Christiansen. That request was denied.

Your Honor, I would also just refer the court to the — on page 14, the minor also made the statement, "Hey, man, tell nobody what I have been telling you." The

response was, "No way, no way."

I think this further indicates that there is an indication that the minor did not understand the nature of the rights, that he did not understand why anything he said would be used against him since he asked, "Well, you are not going to tell

[386] anybody there?" "No, no way, no way," obviously misleading, obviously shows that he had no comprehension of the rights as explained to him.

He attempted to invoke his rights, remain silent. That was not done.

THE COURT: This — state the page number again, of the transcript?

MISS RICE: That was page 14. We stipulated as to that testimony, I believe, the part that was unintelligible.

Further, I would point out to the court the Welfare and Institutions Code section 626(c) in which the various options are open to an officer when a minor is taken into custody, and an officer who takes a minor into temporary custody under the provisions of Section 625 shall thereafter proceed as follows:

> First option, "He may release the minor;"
>
> Second option, "He may cite the minor to reappear;"
>
> The third option, "He may take such minor without unnecessary delay before the probation officer of the county of which the person was taken into custody, or which such person resides,"

and it continues on, and I would submit that that section, the request for a probation officer is really right in line with that section.

He's requesting that his probation officer be notified, that he be turned over to the Probation Department.

[387]Now, it is the philosophy of the Juvenile Court system is that minors be handled by the Probation Office rather than by the usual criminal system of adults.

I think 627 is also indicative when an officer takes a minor before a probation officer, Juvenile Hall, or any other place of confinement, he shall take immediate steps to notify at the time the minor's parents, guardians, and/or responsible relative. I think that the officers in that case made no attempt to contact Mr. Christiansen after the request, and I think that the philosophy of the Welfare and Institutions Code, the Juvenile system, shows how important it is, the role of the probation officer is in this whole process.

I think that Michael recognized that at the station. He recognized how important his probation officer was to him, how much he needed his probation officer at that point when he was in trouble, when he didn't understand what was going on, and his request was denied and statements were elicited from him.

It was clear that at that time he wanted someone there he could trust. He didn't ask for an attorney, but I think for a 16-year-old, the person he did ask for is a person very close in his mind to a parent, and to an attorney. We don't often think of attorneys any more as being counselors, but that is the historical role of an attorney, and I think that his request for a probation officer, number one, shows that he does not want to talk. That's exactly the cry of help discussed in Burton.

Secondly, he wanted to have someone that he could [388] trust, a person who could help him, a person he had a confidential relationship with. It would he his probation officer.

I submit that any statements taken after that were done in violation of these protective safeguards that have been set down, and the petitioner has the burden of proving otherwise.

THE COURT: Thank you. Mr. Levitin?

MR. LEVITIN: Thank you, Your Honor. Your

Honor, counsel has referred to two cases, one of which is the Miranda case. It stands for the proposition that the defendant, when arrested, when he asks for an attorney is entitled to have an attorney present; refers to the Burton case, which says that a parent is also in the same position with regards to a minor child, but there is no case that counsel has referred to, nor is there any case in the State of California, or so far as I am able to determine in the United States which says that a minor or anybody has a right to have his probation officer there.

I am sure we would hear counsel urging, if minor had asked for a good friend, the minor would have a right to have a good friend there, or practically anybody, any name would be an invocation by this minor of his Fifth Amendment rights. I don't think the law has reached that point. I don't think the law will reach that point.

No matter how counsel wishes to manipulate various statutes and various cases, their holdings, there is no case which says that a parent can be substituted for a probation officer in all particulars. I think what we have to do is we [389] have to read these few pages very carefully and determine whether or not the minor is in fact asking to remain silent, whether he is invoking his rights or not, and on page 2 at line 24, the answer is evident, could not be made clearer. There is no way that anybody can say what the minor is trying to say in those words any clearer that the minor said them.

He said, "Yeah, I want to talk to you." I think we have stipulated, am I correct, that the unintelligible is, "I want to talk to you," is that correct?

MISS RICE: Yes.

MR. LEVITIN: All right, and that's after everything had gone before. It is obvious that the minor did not want to know about his probation officer, but that in no way according to what I read this indicated that he didn't want

to talk to the police officers. He just wanted to know whether or not he could have his probation officer there, whether he could call his probation officer, and the officer is within his rights when saying, "No, no, I am not going to call Mr. Christiansen tonight. There is a good chance we can call him tonight, but I am not going to call him right now.," Then he gets to the point of the attorney. "If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to, but if you want to say something, you can. If you don't want to say anything, you don't have to. That's your right. Do you understand that right?" The minor answers, "Yeah."

"Will you talk to us without an attorney present?" The question is, "Is that clear," unequivocable statement, [390] "Yeah, I want to talk to you," and I think everything after that is just a complete waiver of the rights.

THE COURT: All right, any reply?

MISS RICE: Your Honor, simply that Burton case does not hold that minor has the right to have his parents present. Burton case did not equate presence of the parents with presence of attorney. I am not urging that this minor had the right to have his probation officer present at that moment.

The holding of Burton on Miranda grounds, in my argument is on *Miranda* grounds, and on Randall grounds that by asking for the probation officer is indicating he did not wish to speak at that time. That is the reason of the court in Burton, and I feel should be the reason of the court in this case, right on point with Burton as to request to have an adult present, it is an indication that is a call for help, indication he did not wish to speak at that time.

THE COURT: I think it is a factual question in each case as to whether the minor is indicating that he does not want to give up his right to remain silent or just what the purpose of the statement is.

I point out at page 2 of the transcript that prior to asking, "Can I have my attorney or my probation officer

here," the minor does state, "Yeah, I might talk to you." It seems to me that the statement both before and after the question whether he can have his probation officer here indicates pretty clearly that the minor is willing to talk without the probation officer or without the attorney.

Sergeant Miller apparently has gone on to — after [391] the question, "Can I have my probation officer here," he has gone on again to re-explain the right, "If you don't want to talk to us, you don't have to. If you don't want to say something, if you want to say something, you can. If you don't want to say something, you don't have to. That's your right. Do you understand?"

The minor says, "Yes." He explains that, "We can talk to the probation officer later, but I am not going to call him right now," and it seems to me we are dealing here with a 16, 16 and a half year old minor who has been through the court system before, has been to camp, has a probation officer. We are not dealing with a young, naive minor with no experience with the courts. I just do not construe it in this case as an indication of the privilege.

In Burton, as you recall, the parent was present in the police station and had requested to see the minor, and the minor had several times requested to see the parents, and while they don't set forth the conversation or the interrogation that occurred in Burton, one certainly gets the impression from reading the decision that the minor was just kind of worn down. I don't see that in this case at all. The statement, "Can I have my probation officer present," occurs right at the outside of the conversation. There is no evidence of any lengthy prior interrogation or anywhere keep having to — or they keep pursuing a substantive offense prior to a waiver of a right. It seems to me there is a clear waiver at the outset in this case.

The court denies the motion to exclude the conversation.

[392]MR. LEVITIN: I believe Sergeant Miller was on the stand, Your Honor.

STANLEY L. MILLER,

recalled as a witness on behalf of the petitioner, resumed the stand and testified further as follows:

THE CLERK: You have previously been sworn. State your name again for the record, please.

THE WITNESS: Stanley L. Miller, M-i-l-l-e-r.

MR. LEVITIN: If I can have a moment to speak to counsel? Can I have the transcript of the expurgated version of the transcript?

THE COURT: Of Christman? Petitioner's 18.

DIRECT EXAMINATION (continued)

BY MR. LEVITIN:

Q. Sergeant Miller, I am showing you Petitioner's 18, this transcript of what purports to be Michael Christman's statement. Have you had an occasion to read either that copy or the original of that copy?

A. Yes, Sir.

Q. And is that a true and accurate copy of the statement made by the minor Christman?

A. Yes, sir.

MR. LEVITIN: And, Your Honor, at this time I'd like to have marked as Petitioner's next in order one sheet of paper.

THE COURT: Petitioner's 19.

MR. LEVITIN: I will mark it on the reverse side.

[393]MISS RICE: Your Honor, could we just incorporate by reference the changes that we agreed to earlier as to what was said? Is that then incorporated in that transcript, the changes we went through on Friday?

THE COURT: The ones that you stipulated to, the court has made those changes by interlineation pursuant to counsel's stipulation, that is correct.

MISS RICE: All right, fine.

Q. BY MR. LEVITIN: Let me show you what has been marked as Petitioner's 19, this document. Would you look at this for us, please, and tell us whether or not you have seen that document before today?

A. Yes, sir, I have.

Q. Could you tell us how it was deduced?

A. Okay, on the top of the document it says, "By Michael Christman," with the date 2-4-76, 1930." This was placed on this document by myself.

Below that, towards the top of the page, is a diagram. This diagram shows, or this diagram is a diagram drawn by the minor Michael Christman in my presence while I was questioning him.

Q. And you have gone through the statement, Petitioner's 18 —

A. Yes, sir.

Q. — and correlated that statement with the position at which Mr. Christman was referring to the diagram that he was producing?

A. Yes, I believe it was Thursday here in court, I [394] placed the word, "Page 24, line number 1," towards the bottom of this page which is —

THE COURT: Is that a reference to Petitioner's 18, the transcript?

MR. LEVITIN: Yes, it is a reference to Petitioner's 18.

Q. And if you would at this time look to page 24, line 1, and indicate for us what the petitioner or what the minor was doing at the time that he was drawing that diagram with reference to that page, if you would.

A. Okay, I'd be asking Michael Christman questions in regard to the homicide that occurred 1-19-76 at 8939 Lemona Street. I asked Michael Christman if he could draw me a picture of what he was talking about, and at that

point he stated, "All right," that he used this piece of paper and a pen. He said, "Here is a room here," and that front door is right here. I was in the bushes here."

Q. All right, while you are doing that, could you show us on the diagram, indicate on the diagram what he is indicating with the pen.

A. He indicated, he said, "Here is a room here," indicating this part in here (indicating).

THE COURT: I wonder if we might — do you have another colored pen where Sergeant Miller could draw a line extending out from the diagram and mark that?

Q. BY MR. LEVITIN: When he said,"Here is a room here," you indicated a position somewhat within the rectangle that he drew. Could you draw an x at that location?

THE COURT: Why don't we simply put a — draw a line out and

[395] put the word "room." That would key it out better.

MR. LEVITIN: All right, thank you.

THE COURT: Record will reflect Sergeant Miller is marking the diagram with a red pen to distinguish his drawing from the minor Christman's.

Q. BY MR. LEVITIN: And then he said,"And the front door is right here." Where did he indicate the front door?

A. Okay, on that —

THE COURT: You are making that position "door"?

A. Front door with an arrow pointed to an opening.

Q. BY MR. LEVITIN: And then he said, "I was in the bushes here." Would you indicate the position where the bushes were?

A. He indicated to it, but he didn't draw it on the map.

Q. And then he goes on and he says a little later on, and he said, "And then the garage door comes out." Did he

indicate the garage door on the map?

A. Yes.

Q. Perhaps it would be easier if you tell us what he did indicate on the map when he talked to you instead of my doing it this way?

A. He pointed to that portion rather than drawing anything in it.

Q. What did he point to?

A. He pointed to this area.

THE COURT: You are marking that how?

THE WITNESS: Pointed to the garage.

[396]MR. LEVITIN: Okay, thank you. I have no further questions of the witness.

THE COURT: Counsel, do you have any other questions to be asked during the course of trial on direct of Sergeant Miller rather than we handle the entire matter almost piecemeal, but as relating to each of the conversations, but if he has any other evidence to give, I think we might proceed at this time.

MR. LEVITIN: No, no, that's all the questions I have on any subject matter.

CROSS-EXAMINATION

BY MISS RICE:

Q. Sergeant Miller, when you examined the Yeager residence the evening of January 19, isn't it true that you found no evidence of ransacking?

A. Yes, that is true.

Q. And no evidence at that time of anything missing, isn't that correct?

A. That is true.

Q. During your conversation with Michael Christman, did he cry during that time he was making certain admissions to you?

A. Not that I recall.

MISS RICE: May I have a moment?

(Counsel conferring at the counsel table.)

MR. LEVITIN: Your Honor, petitioner is agreeable to stipulating that beginning at page 16 and continuing through

[397] some additional page, page and a half, is that correct, counsel, there was some sound that seemed to be sniffling or crying on the recording.

MISS RICE: I don't think we need to rehear, Your Honor.. On page 16, line 6, a statement is, "Wait a minute," and at that point you can hear sniffling, and there is a rather lengthy pause in it there. The transcript reflects "pause in recording," and there is a pause at that time, and you can hear sniffling throughout that. On line 24, line 25, "No audible answer," and you can hear this continuing on.

I believe it is beyond the — it's about a page and a half or two pages that it is audible on the tape.

THE COURT: Very well, court accepts the stipulation.

MISS RICE: I have nothing further.

THE COURT: You have any questions, Mr. Kaufman?

MR. KAUFMAN: No, Your Honor.

MR. LEVITIN: Petitioner offers the evidence heretofore marked as —

MISS RICE: Your Honor, I am sorry, I do have one question.

THE COURT: The court has a couple of questions. Perhaps I can ask those now and give you an opportunity for further cross-examination.

Where was the minor Michael Wayne Christman arrested, Sergeant?

THE WITNESS: Your Honor, I did not arrest him. The exact location, I would have to refer to my report, but near his home or at his home. It was up in the Lakeview Terrace area

[398] where he lives.

THE COURT: Did you ever go to Michael's home on any occasion?

THE WITNESS: I did not myself, no, Your Honor.

THE COURT: Did you ever see his stepfather, Alex Childs, at the station or at any time following the minor's arrest?

MISS RICE: Your Honor, I would object to the reference to Mr. Childs as stepfather.

THE COURT: It is judicially noticed a part of the file.

MISS RICE: The court did allege additional notice that as part of the file —

THE COURT: It is alleged and not denied in the petition. Minor's address is also part of the file, part of the petition.

MISS RICE: Well, Your Honor, I would object at this time to the court judicially noticing that. That is prepared by the Probation Department. I am sure the court is aware how often those factors are mistaken on the petition. I don't believe it has been established other than by hearsay as to what exactly the nature of who Mr. Childs is and what his relation to this minor is.

MR. LEVITIN: I think I recall being present in court at one time. I think it was in this department when Mr. Childs was here and answered to that call. Am I mistaken in that?

MISS RICE: We can check the record. I don't think he

[399] was ever in court.

THE COURT: He was not in this room. Only Mr. Christiansen, the probation officer, was here from the outset.

MR. LEVITIN: Oh, I see.

THE COURT: Well, perhaps we could simply — maybe we can recall Mr. Christiansen concerning the minor's home, and court will withdraw its question of this

witness. Did you have an additional question?

MISS RICE: Not at this time.

MR. KAUFMAN: I have nothing further.

THE COURT: You may step down.

MR. LEVITIN: I will call Mr. Christiansen.

CHARLES P. CHRISTIANSEN,

called as a witness on behalf of the petitioner, having been previously sworn, resumed the stand and testified further as follows:

THE CLERK: Please take the stand. You are still under oath.

THE COURT: State your full name?

THE WITNESS: Charles P. Christiansen.

MISS RICE: Your Honor, I would object at this time in that the court — respectfully would submit that the court is prosecuting the case at this time. I believe it is improper. I would object to the court calling Mr. Christiansen.

THE COURT: The court is not calling Mr. Christiansen. You may proceed.

MR. LEVITIN: All right, thank you.

[400] DIRECT EXAMINATION

BY MR. LEVITIN:

Q. Mr. Christiansen, you have been Mr. Christman's probation officer for approximately a year and a half, is that correct?

A. Yes.

Q. And has he told you of his home address?

A. Has he told me of his home address?

Q. Yes.

A. Yes, I have been there many times.

Q. All right, and what is that home address?

Q. 12232 Van Nuys Boulevard, Lakeview Terrace.

Q. Have you met members of his family while at that address?

A. Yes, and also in my own office.

Q. And have you met a person identified to you by himself as Alex Childs?

A. Yes, I have.

Q. Is that person living at that same address, 12232 Van Nuys Boulevard, Lakeview Terrace?

A. Yes, he does.

MR. LEVITIN: I have no further questions.

THE COURT: All right, anything further?

Q. BY MR. LEVITIN: Is that a single family residence?

A. Yes, It is.

MISS RICE: Could I have a moment, Your Honor?

Your Honor, could I see the court's copy of the court's petition? Mine is ripped off from the rest of my papers.

[401] I am unable to find it.

I have nothing further.

THE COURT: Anything further?

MR. LEVITIN: No, nothing further of the witness.

Petitioner now offers into evidence all the matters heretofore marked as exhibits, Your Honor, with the exception of the originals of the two statements, one by Christman and one other by, I guess it was Jerro or Cooke.

THE COURT: Jerro.

MR. LEVITIN: And that's all.

THE COURT: Now, let me just see if I understand. Those matters included are Christman's original — transcript of his original statement was Petitioner's 16.

MR. LEVITIN: Yes, I believe that's correct.

THE COURT: That one you are not offering?

MR. LEVITIN: No, not into evidence.

THE COURT: Was there some other one?

MR. LEVITIN: I believe Jerro's.

MR. KAUFMAN: Jerro's, it was just submitted to

the court to allow her to read the original Arandized —

MR. LEVITIN: All right, so it's just Christman's original; however, we have the Christman's expurgated excised version.

THE COURT: Which is Petitioner's 18. All of Petitioner's exhibits marked for identification, with the exception of Petitioner's 16, will be received in evidence.

MR. LEVITIN: Petitioner rests.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES SITTING AS A JUVENILE COURT

DEPARTMENT NO. 203
HON. BONNIE LEE MARTIN, JUDGE

In the Matter of

(1) Michael Wayne Christman,	(1) No. 466633
(2) Michael Cooke,	(2) No. 503635
(3) Robbin Jerro,	(3) No. 494734

all persons under the age of 18 years.

PARTIAL REPORTER'S TRANSCRIPT OF DISPOSITION HEARING CONDUCTED ON MAY 10, 1976[4]

Q. [By Miss Rice] [439] Basically what have you talked to him about in regards to what happened?

A. [By Charles P. Christensen, Probation Officer] I've talked to him about factually what happened, "Describe to me point by point what you did, what the other boys did."

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[4](Reporter's Transcript, pages 439, line 3 through 440, line 14.)

I've also talked to him about how he saw himself in that. Michael's openness about his involvement in it was so open, so candid that it was a problem in the beginning. He wanted to relate to me and wanted to talk about the incident before the adjudication, and I had to tell him numerous times that I didn't want him talking to me about that point, that he hadn't been — his adjudication hadn't been completed; and that I — part of my function is a peace officer. Michael's emotional response to the incident I think that may be what you're referring to, the first time I saw Michael on the Friday after he was arrested which was before the detention hearing he cried. I'm not really sure whether I can say that that was because he felt guilty, whether it was remorseful. I'm not real sure. I know that he spent most of the time crying. He has on other occasions also with the police when the police were talking to him, at the time of the incident when he started describing it on the tape, and I'm guessing it sounds like he's crying on the tape. This I see as important, especially in light of that Michael's own family, his mother, his older sister, his younger brother, and his younger sister described Michael

[440] as not crying any time before even when he hurt himself he doesn't cry, and this is ever since he's been a little boy.

THE COURT: I am beginning to lose sight of the question. I think she wanted to know what Michael had said about his involvement in the incident.

Q. BY MISS RICE: And his response, his concept of what happened.

THE COURT: See, the Court has heard the tapes and I have read what is in your report; so I am aware of the fact that Michael was crying at the time he talked to the police officers.

Let's just have what if anything Michael told you about his involvement in the offense. I think this was what the question called for.

STATEMENT TRANSCRIPT[5]

TAPE NUMBER 61725
RECORDED STATEMENT OF
MICHAEL W. CHRISTMAN
Investigators: S.L. Miller, 12779, Van Nuys Investigative
L. Ridenour, 7877, Vay Nuys Investigative

Transcription: J.J. Rabe, J8871 Robbery-Homicide Division, L.A.P.D.

BY INVESTIGATORS:

Q. Michael, I'm Investigator Miller, Van Nuys Homicide. This is Investigator Ridenour. Do you know why you're here?

BY MICHAEL CHRISTMAN:

A. No.

Q. I'll tell you why you're here. You're here for a murder investigation. Okay? Now do you understand why you're here?

A. Yeah.

A. I'm going to advise you of your constitutional rights. I'll advise you that you have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning. Do you understand all of these rights as I have explained them to you?

---

[5]The following Statement Transcript (ST) was admitted into evidence in the Juvenile Court as Petitioner's Exhibit No. 18.

A. Yeah.

Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?

[2] A. What murder? I don't know about no murder.

Q. I'll explain to you which one it is if you want to talk to us about it.

A. Yeah, I might talk to you.

Q. Do you want to give up your right to have an attorney present here while we talk about it?

A. Can I have my probation officer here?

Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

A. How I know you guys won't pull no police officer in and tell me he's an attorney?

Q. Huh?

A. (Unintelligible) . . . Repeat of line 10

Q. Your probation officer (Unintelligible) is Mr. Christiansen

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us wihout an attorney present?

A. Yeah, I want to talk to you.

Q. Okay. All right, Michael, the reason you're here is because you've been identified by a witness. Your dad's

[3] truck has been identified.

A. Yeah, I know all about that.

Q. You know all about that?

A. Yeah (Unintelligible). . . . hit and run (Unintelligible). . . for a robbery, not for a murder.

Q. Well we (Unintelligible) . . .

A. What?

Q. Well we don't always play fair, do we?

A. (Unintelligible) . . .

Q. Do you want to tell us about it?

A. No, I don't know anything about it.

Q. You don't know anything about it?

A. (Unintelligible) . . .

Q. (Unintelligible) . . .you've been driving your dad's truck?

A. (Unintelligible) . . .

Q. Last few weeks?

A. Yeah, a couple of days (Unintelligible) . . .

Q. When was the last time you drove that truck; do you remember?

A. Yeah (Unintelligible) . . . no, Monday night.

Q. Monday night?

A. Yeah, this past Monday, not the 25th.

Q. When did you have it before that?

A. Friday night.

Q. Where were you at last Friday night?

[4] A. At the Santana (Phonetic).

Q. The Santana?

A. Yeah (Unintelligible) . . . Sherman Way.

Q. What is that?

A. A Club.

Q. When did you have it before that?

A. I don't know.

Q. Huh?

A. I don't know.

Q. You don't remember?

A. Huh uh.

Q. (Unintelligible) . . .

A. The Friday before that (Unintelligible) . . .

Q. Did you have it last night (Unintelligible) . . .

A. I don't drive it on Monday (Unintelligible) . . .

Q. You don't usually drive on Monday?

A. Nope.

Q. Your dad told me you had it last Monday and you had it the Monday before that.

A. (Unintelligible) . . . old man said.

Q. Huh?

A. (Unintelligible) . . .

Q. Yeah.

A. (Unintelligible) . . .

Q. (Unintelligible) . . .you say you don't normally have it on Monday night, but your dad told me that you had it last.

[5] Monday night and the Monday night before that.

A. (Unintelligible) . . . I don't remember (Unintelligible) . . . that was just this Monday.

A. Where did you go this Monday when you had the truck?

A. (Unintelligible) . . . see that girl (Unintelligible) . . . Rosco (Unintelligible) . . . before she goes back to Seattle, Washington.

Q. What would make the difference what Monday night it was?

A. (Unintelligible) . . . nothing to do (Unintelligible) . . . got money to put in the gas tank sometimes I don't.

Q. Yeah, but don't that happen on Friday nights too?

A. No, I always get my money before the weekend.

Q. Well there's some Friday nights you had it then. There's some Saturday nights you had the truck.

A. I don't drive the truck on Saturdays because my mother (Unintelligible) . . . three o'clock in the morning (Unintelligible) . . . gas.

Q. How about Sunday night?

A. If I had to go to school I might (Unintelligible)

Q. (Unintelligible) . . . use it during the week at all (Unintelligible) . . . once in a while (Unintelligible) . . .

A. Yeah.

Q. Well then you wouldn't know exactly what nights you had it and what nights you didn't, if you go back too far; right?

[6] A. If I put my mind together I know everything I do.

Q. All right. What did you do, let's say on the 12th, the 12th of January. That was a Monday night.

A. (Unintelligible) . . . I might have been (Unintelligible) . . . one of them days I went to court.

Q. What was your court for? What was the allegation against you for going to court?

A. Possession.

Q. Possession?

A. And I go on the 15th of this month.

Q. What did you do on the Wednesday then, the coming Wednesday after that, which —

A. (Unintelligible) . . .

Q. — 12th, would be the 14th.

A. I don't know.

Q. How about the 17th, Thursday (Unintelligible

A. I don't know.

Q. (Unintelligible) . . . Saturday night?

A. (Unintelligible) . . . didn't have the truck.

Q. What?

A. All I know, this Saturday (Unintelligible) . . . how many Saturdays was that before the Saturday just passed?

Q. About three.

A. Three. I wasn't going nowhere because I go on a paper route at three o'clock in the morning with my mother. I'd be in by Seven, six o'clock.

Q. Paper route?

[7] A. Yeah.

Q. Do you deliver papers?

A. No (Unintelligible) . . . but I help her.

Q. Oh, every Saturday night?

A. (Unintlligible) . . couple of Saturdays.

Q. What about Sunday nights (Unintelligible) . . .

A. (Unintelligible) . . .

Q. She drives the truck, huh?

A. Not necessarily, no.

Q. How about Mondays?

A. That morning I just told you about when I went out there to see that lady.

Q. Well, yeah, but (Unintelligible) . . . haven't you?

A. Yeah (Unintelligible) . . .

Q. Do you remember (Unintelligible) . . .taken care of on Tuesday nights when you were driving the truck?

A. Nope.

Q. How about on Monday nights, do you remember any business on Monday nights?

A. Yeah, just this one in the past.

Q. Well what about prior to that?

A. Nope.

Q. How about in January, do you remember what –

A. Nope.

Q. In other words, you don't remember?

A. Nope.

[8] Q. What you had going on?

A. Nope.

Q. Mike, Investigator Miller here told you you've been identified and the truck has been identified in regard to a homicide. Now the idea here is that you — Did you somehow kill somebody?

A. Nope.

Q. Do you know of anybody who did kill anybody?

A. Might. I know a lot of people (Unintelligible).

Q. Okay. Now are you a ringleader — Are you the ringleader of this particular gang you run around with?

A. I don't run around with no gangs.

Q. Well did you mastermind this killing that took place?

A. Nope.

Q. Was it your idea to kill somebody?

A. No.

Q. Well if you know (Unintelligible) . . . a person goes to jail a long time for killing somebody sometimes, right?

A. Yeah.

Q. But yet sometimes things happen when they really wasn't expected to happen; right?

A. Yeah.

Q. And a lot of times this does happen; right?

A. Yeah.

Q. People are home when they aren't supposed to be home and all of a sudden they get involved, and people get mad and

[9] people get hurt; right?

A. (Unintelligible) . . .

Q. Huh?

A. That doesn't work that way with me.

Q. How does it work with you?

A. Because I don't get mad. If I get mad, I just get mad (Unintelligible) . . . not going to kill anybody (Unintelligible) . . .

Q. All right. Now let's say you were with somebody and you were out there with some other people and one of your associates or one of your friends got mad and don't have the same temperament you have.

A. (Unintelligible) . . .

Q. So something happens and somebody gets killed.

A. Talk to them and ask them. You got everybody down here. In fact, you got (Unintelligibile) . . .

Q. Were you driving the truck that night?

A. What night?

Q. The night that this guy got killed.

A. I don't know nothing about nobody getting killed.

Q. You know where Lemona Street's at?

A. Nope.

Q. Never heard of Lemona Street?

A. Nope.

Q. Do you know where Nordhoff Street's at?

A. Yeah.

[10] Q. Do you know where Columbus Street's at?

A. Yeah.

Q. Do you know (Unintelligible) . . . is at?

A. Nope.

Q. Do you know where Noble Street's at, Noble and Nordhoff?

A. Huh uh. The only thing I go down Nordhoff is Columbus to go to my sister's house.

Q. When was the last time you were at your sister's house?

A. A long time ago.

Q. How long is a long time ago?

A. Christmas vacation.

Q. What's the address of your sister's house on Columbus?

A. I don't know.

Q. Well between what intersecting streets?

A. It's the first apartment off of Nordhoff to the left (Unintelligible) . . .

Q. (Unintelligible) . . . Nordhoff and Parthenia. They are two big intersections.

A. (Unintelligible) . . .

Q. It's south toward Roscoe?

A. A (Unintelligible) . . .

Q. You haven't been over to your sister's since —

[11] A. Christmas vacation. As a matter of fact, it was before Christmas vacation.

Q. Well you were seen over there, you were seen over there in the truck. Now the idea is, hey, you know, if somebody else that was with you did this and you didn't have any part of it, then you're not the mastermind of it; are you?

A. (Unintelligible) . . . anybody could call the shots and somebody else do it.

Q. Well that's true. I'll agree to that, but the idea is if —

A. Fuck it, man, just stop. I didn't shoot the motherfucker. [Name ommitted] is the one that shot him. (Unintelligible) . . . over there now. (Unintelligible) . . . motherfucking murder on me.

Q. All right. Now let's get this out. Who is [Name omitted]

A. One of them motherfuckers you got a number fourteen, eleven, four or whatever.

Q. Who was he with? Was he in your truck?

A. No, he wasn't in my truck. He was on his feet.

Q. But he just got out of your truck, didn't he?

A. Yeah, but he was still on his feet.

Q. Well, yeah, true. I'll agree. He's on his feet, when he went up there, and when the things happened; right?

A. Yeah, you could say that.

Q. Where are you parked then?

A. Somewhere around there.

[12] Q. Well were you out on your feet too?

A. Nope.

Q. You're in the truck yet?

A. Well you probably could say that.

Q. Did you ever get out of the truck?

A. I always get out of the truck.

Q. No. I mean at the time this happened.

A. Yeah, you could say that.

Q. Well you went back to the location, didn't you?

A. Wait. Wait. Wait. What are you talking about?

Q. The location where it happened.

A. No. I didn't go up to that man's house.

Q. You didn't?

A. No.

Q. Well what did [Name omitted] tell you about it? He saw — He must have told you all about it then.

A. No. What you want me to do, tell you what he told me?

Q. Yeah.

A. I can't do that.

Q. Why?

A. Because mama said don't tell strangers nothing.

Q. Okay, I'm not a stranger.

A. I don't know you.

Q. Who was the other guy with you?

A. Little man out there.

[13] Q. Which one?

A. [Name omitted].

Q. [Name omitted] what?

A. [Name omitted].

Q. [Name omitted]? Whose gun was it?

A. [Name omitted]'s.

Q. [Name omitted] who?

A. [Name omitted].

Q. Where is the gun at now?

A. I don't know.

Q. What did this — [Name omitted], is he white or black?

A. Black.

Q. [Name omitted] is white?

A. Black. I don't know what you got (Unintelligible) . . . search warrant to kick in my front door (Unintelligible) . . . and shit. My sister said they didn't.

Q. We'll get by that —

A. (Unintelligible) . . .

Q. I just talked to your dad on the phone about that.

A. About what?

Q. About the officers.

A. No, man, my dad ain't shit. My dad, man (Unintelligible) . . . kicking my front door, man (Unintelligible) . . . got nothing to show.

Q. All right, Michael, tell us what happened that night.

A. Can't.

[14] Q. No, look, you can tell us what you did, like the fact that you drove up there; right?

A. Yeah.

Q. Okay, tell us about what you did.

A. Nothing, just heard the shot and (Unintelligible) . . .

Q. Okay, now before, what was you going to that area for?

A. You never know until you get into it, like you said.

Q. Well, that's right, you know (Unintelligible) . . . you were out there just burglarizing or what?

A. (Unintelligible) . . . just driving around town.

Q. Okay.

A. Hey, man (Unintelligible) . . . tell nobody what I've been telling you, man.

Q. (Unintelligible) . . . no way. No way (Unintelligible) . . .

A. (Unintelligible) . . .

Q. (Unintelligible) . . . Jerry will come in just a minute (Unintelligible) . . . He'll let us out. I told Jerry (Unintelligible) . . . I wanted my coffee, so he'll be in

here in just a minute. Jerry, I want my coffee. Okay, but anyway, tell us what you were just driving around the area for that night.

A. Yeah.

Q. And so you know what street it happened on, don't you?

A. No.

[15] Q. You aren't familiar with the area? Were you over to your sister's house (Unintelligible) . . . real close to your sister's house; right?

A. I wasn't over there, no.

Q. Oh, got our coffee (Unintelligible) . . . no,not yet. I'll go get it (Unintelligible) . . . Okay, just a minute. Okay, Michael, let me say something to you. You got a good chance that you can come out of this thing pretty good.

A. (Unintelligible) . . . bullshit, man.

Q. But don't screw yourself up, because you knwo what's going to happen. You know and I know. You know why we got all of you in here.

A. Yeah.

Q. Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled.

A. Well, man, put it like this (Unintelligible) . . . take your word for that because, see I know I've been that there situation, what you just told me. They say that to just get you to cop out and then they'll back whatever you want to call it. They'll fuck you (Unintelligible) . . . just to hear you talking (Unintelligible) . . .

Q. Micke (Unintelligible) . . . coffee here (Unintelligible) . . . they are going to bring it into the office. You want a sip? Do you like coffee (Unintelligible) . . . Tell me, Mike, when you were driving around that night (Unintelligible) . . . had the gun, right? What kind of gun is it?

[16] A. Thirty-two.

Q. Thirty-two?

A. Yeah.

Q. Was it a short one or — What — What — What happened? Did they jump out of the car, or what?

A. Wait a minute.

Q. Okay, I'll wait a minute.

(PAUSE IN RECORDING) . . .

A. Man, we were just riding around talking about making some money.

Q. Making some money?

A. Yeah, then all of a sudden, [Name omitted] sees this old lady and old man driving, so he said, "Why don't you just follow them (Unintelligible) . . ." We went on and followed them.

Q. Wait. You say [Name omitted] saw the old lady and the old man?

A. Yeah. They was — They was (Unintelligible) . . . coming from somewhere, but we made a U-turn and started following them and then when they parked (Unintelligible) . . . man, he just (Unintlligible) . . . we all went around there and then we waited (Unintelligible) . . . going to leave and then she came back out. And when she came back out they went in and the man came out (Unintelligible) . . . *trash can and he threw a bag at* [Name omitted] *and* [Name omitted] *just shot him.* [Emphasis added.]

Q. You were there at the time; right?

(No audible answer) . . .

Q. Now did [Name omitted] hit him with anything first?

[17] A. Huh uh, not that I know of. He might have hit him first and then shot.

Q. Well you were standing right next to [Name omitted] when he shot him.

A. No (Unintelligible) . . . bushes.

Q. What?

A. I was in some bushes.

Q. You were in some bushes? Where was — What was the other kids' name again?

A. [Name omitted].

Q. [Name omitted]. Where was [Name omitted] at?

A. He might have been in the garage because the garage door was open.

Q. Because the woman had left again with the car, right?

A. Yeah, but see (Unintelligible) . . . had closed teh big door (Unintelligible) . . .

Q. Did you see this man throw some — Was it groceries, a grocery bag?

A. (Unintelligible) . . . trash in the grocery bag.

Q. You — Uh huh. And he threw this at [Name omitted] and [Name omitted] shot? Did [Name omitted] have his gun out at that time?

A. Yeah, I think so. I don't know if he hadit out or not. (Unintelligible) . . . like I said.

Q. Well what — Then what happened after [Name omitted] shot him?

A. We all ran, just left.

[18] Q. Did you go back to the car and jump in the car, pickup?

A. Yeah.

Q. Where did you have it parked?

A. Around the corner. I know the lady was the one who seen me because she was (Unintelligible) . . . around there.

Q. Did you see her?

A. No, but I knwo that's who it was (Unintelligible) . . . . standing around there.

Q. Did you take anything from the old man?

A. No.

Q. Not a thing?

A. Nope.

Q. Where was the location where [Name omitted] shot him? Where was [Name omitted] at and where was the man at?

A. Like the house is (Unintelligible) . . . room there and a room there and the garge door is there. He had a little walk up just like a little (Unintelligible) . . . with a hole in it, you know.

Q. Yeah, a little —

A. All right. The walkway and the man came out the door from this side. [Name omitted] came around the corner (Unintelligible) . . . and [Name omitted] shot him and I was right against the bushes there and [Name omitted] shot him (Unintelligible) . . . I got (Unintelligible) . . . jumped in (Unintelligible) . . .

Q. Whose idea was this to go up to this place, all three

[19] of you, or just yours, or just [Name omitted]'s (Unintelligible) . . .

A. [Name omitted] (Unintelligible) . . . seen the people first in the Cadillac.

Q. Uh huh.

A. So he just said, "Why don't you follow them."

Q. I see.

A. And then we went on and followed them.

Q. Well when you started following them, what was your idea for following them?

A. To get a little money off of them.

Q. You mean just pull up alongside of them and —

A. No, wait till they get out.

Q. Wait till they get out. Where did you park at first when they went in the house with the groceries? You said you saw them walk in the house with the groceries, right?

A. Well —

Q. Or sacks?

A. Well I parked in the same spot.

Q. And they — How come? Were you going to go up to the door later, or how were you going to get them?

A. (Unintelligible) . . . going in there at the same time, then when we statd walking up there the lady (Unintelligible) . . . coming back out and we ducked and then she left and she (Unintelligible) . . . going around the corner. I know she was looking because she seen [Name omitted] and [Name omitted] and (Unintelligible) . . . and when she left (Unintelligible) . . . on up in there.

[20] Q. They are both colored, huh?

A. Yeah.

Q. Well what you're saying is no one really masterminded this; no one planned to shoot him; right?

(No audible answer) . . .

Q. (Unintelligible) . . . of your coffee. But Mike here says that [Name omitted] first saw them and he said, "Why don't you follow that Cadillac." So they drove around and they pulled down in front of this house and they take some bags of groceries out and they go in the house. So they all three jump out of the pickup. They parked their pickup around the corner and they all three jump out and [Name omitted] goes up there and [Name omitted]'s got the gun and his other friend — [Name omitted], yeah, [Name omitted], he don't know for sure, but he thought he

was in the little garage (Unintelligible) . . . some bushes and so then [Name omitted] comes around the corner and told the man to hold it and he throws a sack of trash or something at him and Mike just shot him and (Unintelligible) . . . no one really masterminded it, so to speak. They were just out looking to pick up a couple of bucks. How long have you known [Name omitted] had this gun?

A. I don't know. Maybe had it for a little while, couple of weeks maybe.

Q. When was the last time you seen it?

A. Maybe about a week before he did that.

Q. Well then you saw it again that night, right?

[21] A. Yeah.

Q. When did you see it since then?

A. Wait. Wait. Wait. When did that — I seen it about a week before that and that's the first time I had seen it.

Q. Okay, then you saw it that night which was when Mike shot the person, right?

A. Yeah.

Q. Then when have you seen it since?

A. Never.

Q. Never? What has [Name omitted] told you happened to the gun?

A. He didn't.

Q. You say this is a .32 short barrel; right?

A. Yeah.

Q. Has it got —

A. It looks like a little old .38 snub nose, but it's a .32 (Unintelligible) . . . short bullets (Unintelligible) . . . longs.

Q. Well could it have been a .38?

A. Nope.

Q. Who told you it was a .32?

A. Man, I know guns. I ain't dumb.

Q. Oh, I just — I don't know how well you know, just like you ask me what a 1963 Oldsmobile looks like, I can't tell you because I'm not familiar with cars (Unintelligible) . . . 1963 Chevy looks like, I can, because I used to own one of them before I bought my other car. So, you know, it's

[22] different. (Unintelligible) . . . that's why I'm asking these questions. Stan, can you think of anything else? What I'd like (Unintelligible) . . . because I missed out on that other part. Why don't you run it by me and tell me again like you told (Unintelligible) . . . here what happened. How —

A. We was just riding around and all of a sudden the old lady and man were going one way and we seen them and [Name omitted] said, "Why don't you follow that." So we turned around and followed them. And when they pulled up in the driveway, we parked around the corner and got out. And then we was going to go up there and then the lady started (Unintelligible) . . . at first and we heard her foot prints coming back out. And so the lady got in the car and left and went on around in there and then a man came up to throw some trash away and we were all like — I don't know where [Name omitted] was, but (Unintelligible) . . . bushes (Unintelligible) . . . and I think [Name omitted] was in the garage like I said and then the man (Unintelligible) . . . [Name omitted] just came from around the corner and told him to hold it and the man picked up the trash bag and threw it at him (Unintelligible) . . . and [Name omitted] shot him and then we just all run.

Q. Did he hit him first?

A. I don't know.

Q. I asked him that question too. What was the guy wearing?

A. A blue robe.

Q. And what else?

[23] A. I don't know.

Q. Where did he shoot him at?

A. I don't know.

Q. Where did he tell you he shot him at?

A. He didn't say (Unintelligible) . . . where they shoot people at (Unintelligible) . . . just shoot to shoot them.

Q. Describe the house to me where it happened at.

A. Man, I don't know (Unintelligible) . . . house with a hole in the middle.

Q. With what in the middle?

A. A hole in the middle. (Unintelligible) . . . room here, room here, room here, and the garage here (Unintelligible) . . . walkway goes up and the house (Unintelligible) . . . front door.

Q. Was there any type of entranceway?

A. Yeah, the walkway like you can just — like you said.

Q. Was it a wrought iron fence (Unintelligible) . . .

A. (Unintelligible) . . .

Q. Brick fence (Unintelligible) . . .

A. (Unintelligible) . . .

Q. Did you have to go through any wooden gates, iron gates?

A. (Unintelligible) . . .

Q. You said there's a hole in the middle. Is that what you said?

A. Man, you know what a square is (Unintelligible) . . .

Q. Can you draw me a picture of what you're talking about?

[24] A. All right (Unintelligible) . . . here's a room here — and that front door is right here. I was in the bushes here. And the room was here and there's a little room right here and then the garage door comes out. (Unintelligible)

. . . walked in and [Name omitted] (Unintelligible) . . . to get in this garage right here (Unintelligible) . . . door was and the man comes out the door. [Name omitted] came around the corner and told him to hold it. The man hollered and threw the trash at him, and then he shot him and then we just ran back around to the corner, back to the truck.

Q. Did you see anybody else out on the street that night when that happened?

A. Nope — Yeah, two boys.

Q. Two boys? Where were they at?

A. About four houses in front of the truck.

Q. What were they doing?

A. Sitting in the car.

Q. Sure it was two boys, or it could have been a boy and a girl?

A. It might have been a boy and girl. They had long hair.

Q. Whereabouts was that?

A. Where abouts was what?

Q. Let me show you something here. See this map? Okay, here's the house you talking about, right (Unintelligible) . . .

A. Like that.

[25] Q. (Unintelligible) . . .

A. We were parked (Unintelligible) . . . street (Unintelligible) . . .

Q. (Unintelligible) . . .

A. This is the dead end street we went up and turned around and came back. This is the street (Unintelligible) . . .

Q. (Unintelligible) . . .

A. We were parked right here.

Q. (Unintelligible) . . .

A. There was some (Unintelligible) . . . people in

the car.

Q. Right there?

A. Yeah.

Q. Okay. This is the house now you're talking about, here?

A. Say right about here (Unintelligible) . . . back gate here and then the garage.

Q. Okay, the garage is right here like this?

A. Yeah.

Q. And the back gate is here?

A. No, over to the side a little bit (Unintelligible) . . . room attached here, a room attached here, a room attached here, and something goes right here (Unintelligible) . . . I went in some bushes right here.

Q. Bushes right here?

A. Yeah.

Q. Okay, and then —

[26] A. Garage door.

Q. This opening was here (Unintelligible) . . .

A. No, it wasn't closed like that (Unintelligible) . . . that way.

Q. Oh, that's right.

A. Okay, the room comes that way (Unintelligible) . . .

Q. (Unintelligible) . . .

A. Comes out the front door (Unintelligible) . . .

Q. He comes out the front door here?

A. Yeah.

Q. (Unintelligible) . . . So this is the garage, right?

A. Yeah

Q. And this is that open spot you were talking about?

A. (Unintelligible) . . . door see between the bushes where I was here. Okay, this was the opening (Unintelligible) . . . that would be the sidewalk (Unintelligible) . . .

Q. Okay (Unintelligible) . . . and then this is

where you parked the car then?

A. Yeah.

Q. And this is where you seen (Unintelligible) . . . were you over here across the street?

A. (Unintelligible) . . .

Q. Did you come across the street over here?

A. No. [Name omitted] and [Name omitted] walked across the street.

Q. [Name omitted] and [Name omitted] did. Where were you at?

A. (Unintelligible) . . . this is the house right here.

Q. Yeah.

[27] A. (Unintelligible) . . .

Q. You were over here when they walked across the street. Okay. Now let's go back over just one more thing, Michael. Let's try to get this part down. You've done real good. You've been truthful with us. I know you have because I know things about this investigation that you wouldn't know unless you were there. I know you've been truthful, but the one thing that we're concerned about is the gun. Now do you have any idea where that gun is at? Do you know what he would do with it?

A. He might have sold it.

Q. Who would he sell it to?

A. I don't know (Unintelligible) . . . like shit (Unintelligible) . . . something going down, man (Unintelligible) . . . he might have (Unintelligible) . . .

Q. There was a (Unintelligible) . . .

A. (Unintelligible) . . . Friday night.

Q. This last Friday night?

A. This Friday night coming.

Q. Coming? What kind of caper was that?

A. (Unintelligible) . . .

Q. Where was that going to be at?

A. I don't know. He never told me the address or

nothing.

Q. Is that a house?

A. Apartment house.

[28] Q. How many other capers have you been involved with these other guys, Michael?

A. None.

Q. None at all? Because it's all going to come out in the wash. It's all going to come out and it would look better if you're the one (Unintelligible) . . . because if one of the other guys (Unintelligible) . . . hell I know (Unintelligible) . . . it would be better if it came from you; right?

A. Yeah, but I wasn't —

Q. Well, that's what we're asking you. Was you with (Unintelligible) . . . any other capers?

A. (Unintellegible) . . . do nothing with them.

Q. Did you drive up to the location (Unintelligible) . . .

A. No (Unintelligible) . . . in the truck.

Q. Were you in there (Unitelligible) . . .

A. (Unintelligible) . . .

Q. Just walking around (Unintelligible) . . . What area were you in?

A. Up there where we stay in.

Q. You mean up in Lake View Terrace?

A. Yeah.

Q. Did you ever do anything down on Granada Hills or down in Sepulveda, down in there?

A. Nope.

Q. Don't you guys caper over north there?

A. Nope.

[29] Q. (Unintelligible) . . .

A. (Unintelligible) . . . go out there to Sherman Way and Topanga Canyon, like to go to that club on Friday nights.

A. Well how did you happen to get involved in this particular deal on this particular night?

A. We was just riding around.

Q. And where had you been before that?

A. At my house.

Q. Were you going — Where were you going when you went in that area?

A. (Unintelligible) . . .

Q. But did you plan on going to your sister's? It's real close to your sister's, wasn't it?

A. Nope — Yeah, it was, but (Unintelligible) . . . messing with my sister, man.

Q. Well, I was going to say how did you happen to hit this particular area?

A. Just riding around (Unintelligible) . . .

Q. Where was those other people's car, the Cadillac you see when you first saw it, and [Name omitted] says, "That looks like a couple of people that (Unintelligible) . . .

A. (Unintelligible) . . . going down north (Unintelligible) . . . don't know for sure.

Q. (Unintelligible) . . . Sepulveda, or what?

A. Might have been.

[30] Q. (Unintelligible) . . .

A. Down by the school.

Q. What school was that?

A. Monroe.

Q. Oh, Monroe (Unintelligible) . . . not too far from here (Unintelligible) . . . which is Nordhoff and Haskel, Sepulveda and Haskel.

A. (Unintelligible) . . .

Q. Saw them and then followed them (Unitelligible) . . . Did you know that [Name omitted] had the gun at this time?

A. Yes.

Q. And what was your conversation before that, just to pick up a few bucks that night or what?

A. Before we started riding around or what?

Q. No, when you were riding around.

A. We was just riding around, then all of a suddden, man, he just (Unintelligible) . . . He had the gun on him, man, and he said (Unintelligible) . . . money. I said, "I don't really care." I said, "But I ain't going out there (Unintelligible) . . . go in anybody's house (Unintelligible) . . . half the time the thing don't even shoot. And so he said, "All right then (Unintelligible) . . . going back home because it was getting close to the time to go home and then (Unintelligible) . . . He said, "Turn around and go."

Q. Okay, [Name omitted], before you puleld in here and parked, when you came down through this way?

[31] A. Uh huh.

Q. What were you ding, just before you came down through here, when you first come into that street?

A. Wouldn't Nordhoff be running down this way?

Q. Yeah, Nordhoff is right there.

A. (Unintelligible) . . . down Nordhoff here towards Osborne.

Q. Yeah, and where did you turn around at, could you remember?

A. Right there somewhere by the school.

Q. When you come down here, did youhave your lights on?

A. Yeah.

Q. You're sure you had your lights on when you come down by the —

A. Yeah, I turned my lights off when I went up in this horseshoe street and made a U-turn.

Q. Was that before it happened or after it happened

when you had — When you made your turn in the horseshoe?

A. Before.

Q. Before? Then you went back there and parked where your car is standing; that's when all of you got out of the car (Unintelligible) . . . or had some of you got out of the car before that?

A. (Unintelligible) . . . got out at the same time.

A. Okay, is there anything that you can think of that we haven't asked you that we should know about here?

[32] A. Huh uh.

Q. When you went up to the house — When the three of you went up to the house, what were you going to do?

A. (Unintelligible) . . . door was unlocked, see where it was cracked and not all the way closed (Unintelligible) . . . go on in. We had seen the man in the back room doing something back there and the door was way on this side of the house (Unintelligible) . . . to get to where he was.

Q. What were you going to do once you got in? He surely would have heard you.

A. (Unintelligible) . . . No, he wouldn't. The door was already half-way open.

Q. So what you were just — what, going to get what you could (Unintelligible) . . .

A. (Unintelligible) . . . wait till he came out (Unintelligible) . .

Q. Were you interested in taking merchandise at the house, or were you interested in actually taking money from him?

A. Just money.

Q. Have you read about this in the newspaper?

A. Nope.

Q. Heard about it on TV or anything?

A. Nope.

Q. But you knew what it was all about when they brought you in tonight. Had you figured it out?

[34] A. Man (Unintelligible) . . . motherfucking police pulled a gun and pointed it to my head, man (Unintelligible) . . . what the hell's going on.

Q. Did you think (Unintelligible) . . .

A. Yeah (Unintelligible) . . . I'm going to get caught, but (Unintelligible) . . . them motherfuckers (Unintelligible) . . . mouth shut.

Q. How many guys know about this?

A. Shit, I don't know.

Q. All of these guys out here (Unintelligible) . . .

Q. (Unintelligible) . . . we don't associate with them (Unintelligible) . . .

Q. How many guys do you know that do know about it?

A. I don't know if they know about the shooting, but I know (Unintelligible) . . . make some money that night (Unintelligible) . . .

Q. Who told them?

A. [Name omitted] because he's the only one that ever talks.

Q. Who do you think he told?

A. Hard to say (Unintelligible) . . . he might not have told nobody. And he might (Unintelligible) . . .

Q. Well what was (Unintelligible) . . . between you and [Name omitted] and [Name omitted] regarding not saying anything about this?

A. At first we just all said we wasn't going to say nothing, then we just split up.

Q. Well you have seen [Name omitted] since then, haven't you?

[35] A. Yeah.

Q. What was said about it at that time?

A. Nothing.

Q. No conversation (Unintelligible) . . .

A. He came over about maybe a day or two (Unintelligible) . . . "Man, did you hear us on the news (Unintelligible) . . . he said, "Bullshit (Unintelligible) . . . Didn't say nothing else about it.

Q. Did you tell your girlfriend about it?

A. Nope.

Q. Did you tell your dad about it?

A. Nope.

Q. Is [Name omitted] and [Name omitted] over to your house quite a bit?

A. Yeah, [Name omitted] don't (Unintelligible) . . . come over that much (Unintelligible) . . .

Q. He wants to go out and caper, huh?

A. Yeah.

Q. Then you've been out capering with him on other times. Have you ever shot —

A. (Unintelligible) . . .

Q. Okay.

A. Because I don't like to do nothing in my mother's truck.

Q. Okay (Unintelligible) . . .

A. (Unintelligible) . . .

Q. Has he ever told you that he had to shoot anybody else?

[36] A. (Unintelligible) . . . he don't know if he shot him.

Q. What do you mean when he's gang-banging (Unintelligible) . . .

A. When they used to have a lot of gangs going around shooting up people (Unintelligible) . . . for the hell of it.

Q. Did he ever mention any specific incidents to you?

(No audible answer) . . .

Q. Okay, that's it for now, Michael. We'll talk to you tomorrow. How old are you now, Michael?

A. Sixteen.

Q. Sixteen (Unintelligible) . . . We'll be back in a few minutes.

(END OF RECORDING) . . .

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

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KENNETH F. FARE,
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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I

NO IMPORTANT FEDERAL QUESTION IS PRESENTED IN THIS CASE

Petitioner has cited 28 U.S.C. 1257 (3) as the basis for the jurisdiction of this court. However, the granting of a writ of certiorari lies in the sound discretion of the court, and that discretion will not be exercised where the federal question raised is not important, where it is merely "academic or episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 73-74 (1977). Rule 19(1)(a) of the Rules of the Supreme Court provides that for the court to exercise its discretion to grant a writ of certiorari a federal question of substance must be involved. The question presented in this case is simply not important enough to justify

exercise of this court's discretion.

First, it appears that requests by suspects for the presence of persons other than attorneys occur very infrequently. There have been only a handful of reported cases in California involving requests for non-attorneys. Review of the authorities reveals that a minor's request for his parents, and an adult's request for a doctor or psychiatrist, have been held in California to invoke the Fifth Amendment privilege against self-incrimination per se. People v. Burton, 6 Cal.3d 375 (1971); In re Roland K., 82 Cal.App.3d 295 (1978); People v. Parker, 45 Cal.App.3d 24 (1975). But an adult suspect's request for his employer has been held not to invoke the Fifth Amendment. People v. Barrow, 60 Cal.App.3d 984 (1976). No other reported decisions in California have been found which involve a request by a suspect for the presence of a person who is not an attorney.

There appears to be a grand total of three other cases outside of California dealing with requests by minors for parents. All three have ruled that such requests do not per se invoke the Fifth Amendment. Chaney v. Wainwright, 561 F.2d 1129 (CA 5 1977); State v. Young, 220 Kan. 541, 555, 552 P.2d 905, 916 (1976); People v. Riley, 49 Ill. App.3d 304, 464 N.E.2d 306 (1977). Significantly, a petition for writ of certiorari was denied by this court in the latter case. Riley v. Illinois, 98 S.Ct. 1657 (1978). Respondent suggests that the denial of certiorari in Riley was proper because the issue did not qualify as "important." As few cases as there are involving the request by a minor for his parent, respondent has found no other published decision dealing with a minor's request for his probation officer during a custodial interrogation. Certainly petitioner has cited none. Indeed, "expansions" of the Fifth Amendment to requests for persons other than attorneys appears to be virtually nonexistent. This issue is thus clearly "episodic," and much too insignificant to justify the

exercise of this court's discretion to grant the writ of certiorari.

Second, the decision of the California Supreme Court is of extremely narrow impact. That court did not rule that asking for anyone sufficed to invoke the Fifth Amendment, but instead emphasized that requests for "consultation with one's football coach, music teacher or clergyman" do not constitute per se invocations of the Fifth Amendment. In re Michael C., 21 Cal.3d 471, 477 (1978). What remains is a question of the most limited breadth.

Petitioner has disclaimed that the decision of the California Supreme Court was based on any unique status of the probation officer in California law, stressing the court's reliance on Miranda v. Arizona, 384 U.S. 436 (1966). Petition for writ of certiorari, p. 16. This is obviously untrue, or under the court's reasoning a request for consultation with a football coach, music teacher, or clergyman would suffice to invoke the Fifth Amendment. The California Supreme Court expressly disavowed that principle.

The unique role of the probation officer in California is discussed, ante, in II, at pp. 5-7. All the California Supreme Court has held in the instant case is that in light of the statutory and case development of the role of probation officers, a request by a minor in California for his probation officer is the equivalent of asking for an attorney by an adult. The very variety of juvenile justice systems employed by the various states was among the justifications given by this court for rejecting a blanket rule commanding jury trials for all juveniles accused of crime. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). Certainly that reasoning has encouraged the states to devise a variety of probation systems and to experiment with expanding or contracting the role of probation officers toward the wards entrusted to their care and supervision. A state is free either to make a probation officer adverse to a minor or to create a close relationship. No rule as to the role of probation officers in California can have general impact

upon the variety of juvenile probation models which exist throughout this country. Consequently, whatever its importance in California, the decision in this case has very little significance generally and thus does not qualify as an important federal issue.

Third, the very role of the probation officer in this state has changed since Michael C. asked for his probation officer in 1976. Petitioner has included the text of California Welfare and Institutions Code section 650 in that portion of his petition entitled "Statutes Involved." Petition for writ of certiorari, p. 5. The text cited, however, did not come into existence until January 1, 1977. In 1976, when Michael asked for his probation officer, section 650 then provided that probation officers were the petitioning party, actually filing the allegations of misconduct against the minor. In re Michael C., 21 Cal.3d 471, 476 (1978). As amended, section 650 now provides that probation officers file petitions only to seek wardship for incorrigibles pursuant to section 601 of the Welfare and Institutions Code, while the District Attorney is given the exclusive responsibility to file petitions under section 602 of the Welfare and Institutions Code as to minors alleged to have committed acts which would be crimes if committed by adults.

While this change continues the trend toward making the relationship between minor and probation officer closer and not more hostile, any decision in this case adverse to respondent would of necessity be in the context of the former statute; it would not become stare decisis as to the new statute, which creates an even closer relationship. Thus, the importance of this issue is further minimized by the changed nature of the probation officer-juvenile relationship in California as reflected in the changed statute.

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II

THE DECISION BELOW IS NOT REVIEWABLE BY THIS COURT

It is true, as petitioner notes (Petition for writ of certiorari, p. 15), that the California Supreme Court did not expressly rely on the California Constitution as the basis for the reversal of the order. However, as noted above, the court did rely on the unique role of the probation officer in the juvenile law system of the state of California. In re Michael C., 21 Cal.3d 471, 476-477 (1978).

Where the state court decision is based on a state ground independent and adequate to uphold the decision, this court is without jurisdiction to review it. Jankovich v. Toll Road Comm'n, 379 U.S. 487, 489 (1964). Moreover, a state court decision construing state statutory law binds this court to that construction, and where that construction is dispositive of the case no federal issue remains subject to a grant of certiorari. Uphaus v. Wyman, 364 U.S. 388, 389 (1960). In effect, the California Supreme Court has construed the role of the probation officer under California juvenile law here, in holding that a minor's request for his probation officer is equivalent to asking for an attorney. That conclusion constituted merely a construction of a California statutory scheme, which therefore is binding on this court.

The decision of the California Supreme Court also emphasized the unique status of the juvenile ward-probation officer relationship in California. The court held that the "duty to advise and care" for a minor mandated for probation officers in California means that the consultation by a minor with his probation officer acts as a "protective device . . . to dispel the compulsion inherent in custodial surroundings." In re Michael C., supra, 21 Cal.3d at pp. 476-477. The court expressly relied on the special role of the probation officer in California. Id., at p. 476, fn. 1. In

addition, the court cited cases referring to the "close relationship" in California between minors and their probation officers. Bryan v. Superior Court, 7 Cal.3d 575, 587 (1972); In re Gladys R., 1 Cal.3d 855, 860, fn. 7 (1970).

Furthermore, the court noted that Michael feared the police, and wanted and needed the advice of someone he could trust. The court described his probation officer as "a personal advisor who would understand his problems and needs and on whose advice he could rely." In re Michael C., supra, 21 Cal.3d at p. 476. The court concluded that Michael's request for his probation officer was essentially a "call for help," and recognized the role of the probation officer as a "trusted guardian figure who exercises the authority of the state as parens patriae and whose duty it is to implement the protective and rehabilitative powers of the juvenile court." Ibid. The court added that the probation officer " . . . is frequently the person to whom a minor might turn for help on such matters as to whether or not he should obtain an attorney." Ibid.

Thus, the court has held that the relationship between the probation officer and minors in California is a special and unique one controlled by the legislative scheme governing the role of probation officers in California's juvenile justice system. That unique role of the probation officer in California leaves no federal question over which certiorari can be granted.

The failure of the California Supreme Court to discuss the application of the California Constitution to this issue cannot simply be construed as an indication that the court was impliedly holding that California's constitutional guarantee of the right against self-incrimination, found at article I, section 13, clause 5 of the California Constitution, is identical to the federal guarantee under the Fifth Amendment to the United States Constitution. The court did not expressly hold the California Constitution

provision provides no greater protection than its United States constitutional counterpart; accordingly, its failure to discuss that issue should not be viewed as a decision on that point. Indeed, the California Supreme Court frequently in its decisions refers to a provision of the United States Constitution (e.g., "Fourth Amendment") for convenience although it intends to base its ruling on the California Constitution's counterpart guarantee as well. People v. Cook, __ Cal.3d ___, at ___, fn. 4 (Crim. 19804, filed September 8, 1978).

The appropriate method for ascertaining the intent of the California Supreme Court as to the application of the California Constitution would be to remand the matter back to that court for an express declaration as to that question. In California v. Krivda, 409 U.S. 33 (1972), this Court returned the case to the California Supreme Court to determine whether that court relied on the California Constitution or only the federal Constitution, where the court had not so indicated initially. People v. Krivda, 5 Cal.3d 357 (1971). The California court, on remand, relied on the California Constitution. People v. Krivda, 8 Cal.3d 623, 624 (1973). This was also done in Ohio v. Gallagher, 425 U.S. 257 (1975), resulting in the Ohio Supreme Court's statement that it was indeed relying on the Ohio Constitution. State v. Gallagher, 348 N.E.2d 336 (1976). A determination by the California Supreme Court of reliance in part on the California Constitution would preclude the granting of certiorari.

III

THE REVERSAL BELOW CAN BE SUSTAINED ON GROUNDS APART FROM WHETHER THE MINOR'S REQUEST FOR A PROBATION OFFICER CONSTITUTED A REQUEST FOR AN ATTORNEY

The request by the minor for his probation officer was not the only ground urged by respondent as the basis for the

reversal. Respondent pointed to various threats and promises made by the police during the interrogation as an independent basis for reversal. Appellant's Opening Brief, pp. 16-18. Respondent also urged that the minor's repeated invocation of his right to silence rendered the subsequent confession involuntary. Appellant's Opening Brief, pp. 18-19. These grounds were equally meritorious and would have provided ample additional basis to support the California Supreme Court's judgment of reversal.

"A respondent, however, has the right to urge any argument to support the judgment in his favor (save possibly questions of venue, see Peoria R. Co. v. United States, 263 U.S. 528, 536; United States v. American Railway Express Co., 265 U.S. 425, 435-436, and n. 11), even those not passed upon by the court below and also contentions rejected below. Langnes v. Green, 282 U.S. 531, 535-539; Walling v. General Industries Co., 330 U.S. 545, 547 n. 5." Scherk v. Alberto-Culver Co., 417 U.S. 506, at 525 (1974), Douglas J., dissenting.

The California Supreme Court did not reach these additional issues because its reversal was grounded solely upon the minor's request for his probation officer constituting a violation of his privilege against self-incrimination. However, respondent submits that either of these further grounds likewise supports the judgment in his favor and therefore provides a basis for denying certiorari.

Petitioner contends that once the request for the minor's probation officer is disregarded, the confession was voluntary under the "totality of circumstances" test. Petition for writ of certiorari, pp. 14-15. Petitioner relies on the readvisement of rights following the minor's request for his probation officer. However, the record clearly demonstrates the combined use of threats and promises by the authorities in the face of petitioner's repeated invocation of the right to silence.

Michael was told by the police during the interrogation,

"You got a good chance that you can come out of this thing pretty good." ST 15:7-8. He was then told, "Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled [sic]." ST 15:14-16. These statements are immediately followed by an exchange of words and a "pause." ST 15:17 to 16:23. Michael's conduct during the "pause" was described by defense counsel as "crying" (RT 439:23-26), a characterization in which the trial court acquiesced. RT 440:8-11. Michael then "confessed." ST 16:23 to end. It is unmistakably clear in these circumstances that such promises and threats were being employed by the police to obtain a confession. Such misconduct by the authorities renders the statement involuntary as a matter of law, and regardless of the applicability of Miranda, supra, compels reversal. Lynumn v. Illinois, 372 U.S. 528, 534 (1962).

Moreover, Michael repeatedly invoked his right to remain silent prior to any "confession." Michael was asked almost at the outset if he wanted to tell the officers about the case. He said, "No, I don't know anything about it." ST 3:10-11. When asked about what another minor had said, Michael answered, "I can't do that." When asked why, Michael said, "Because mama said don't tell strangers nothing." ST 12:17-22. Finally, Michael was asked what happened that night, and he said, "Can't." ST 13:25-26. It is therefore plain that on three distinct occasions, Michael told the police he no longer wished to talk with them.

Petitioner is anxious to "insure that the rule adopted in Miranda is confined to the express terms and logic of the original opinion, . . . " Petition for writ of certiorari, p. 12. Yet Miranda itself expressly states that if a suspect indicates in any manner that he wishes to remain silent, any statements obtained thereafter are the product of compulsion and involuntary as a matter of law. Miranda v. Arizona, 384 U.S. 436, 473-474 (1966). Michael

clearly expressed his wish to remain silent. Under Miranda itself, Michael had invoked the Fifth Amendment and his confession is thus inadmissible on grounds independent of the request to see his probation officer.

IV

THE REQUEST BY A MINOR FOR HIS PROBATION OFFICER DOES INVOKE THE FIFTH AMENDMENT

Petitioner is content to note several "exceptions" to Miranda v. Arizona, supra, and to state that no "expansions" of Miranda have been made by this Court. Petition for writ of certiorari, pp. 9-11. Petitioner then argues that in dispelling the inherent coerciveness of in-custody interrogations, the rule of Miranda is limited to requests for counsel; petitioner therefore asserts the California Supreme Court was incorrect in holding that a request for a probation officer invokes the Fifth Amendment. Petition for writ of certiorari, pp. 12-15.

The attempt to limit the class of persons who can dispel the inherent coerciveness of in-custody police interrogations to attorneys is not viable in light of the California Supreme Court's characterization of the unique role of the probation officer in California, discussed above. The duties of the probation officer in California are set forth in California Welfare and Institutions Code section 280, which expressly states that " . . . the probation officer shall . . . represent the interests of each person who is the subject of a petition to declare such person to be a ward. . . ." In view of the mandate upon every California probation officer to represent each potential ward, California law clearly contemplates performance by the probation officer of the same function as counsel, in assisting the minor during in-custody interrogations by police and helping to dispel the coerciveness of that interrogation. See also In re Michael C., 21 Cal.3d 471, 476-477 (1978).

As noted ante (at p. 9), Miranda does more than merely

hold that a request for an attorney precludes the admission of any confession thereafter obtained. Miranda also states that if a suspect during police custodial interrogation indicates in any manner that he wishes to remain silent, any statements thereafter obtained are inadmissible as being involuntary. Miranda v. Arizona, 384 U.S. 436, 473-474 (1966). It is quite clear from the record in this case that Michael's request for his probation officer indicated he no longer wanted to continue the conversation with the police. At the very least, his request for the probation officer indicated that Michael wanted his probation officer present before continuing with the conversation. Moreover, the very exchange quoted by petitioner during the interrogation shows that Michael did not trust the police to bring in an attorney on whom he could rely, when he inquired, "How I know you guys won't pull no police officer in and tell me he's an attorney?" Petition for writ of certiorari, p. 8. Michael asked instead for someone he was certain he could rely on for help, which is, after all, the purpose behind the rule that a request for an attorney bars further questioning.

Adults can reasonably be expected to ask for an attorney. To require the same level of sophistication in a juvenile is to ignore the realities of the differences between adults and juveniles. This Court has consistently held that confessions of juveniles are to be specially scrutinized, over and above the considerations relevant to adult confessions. In re Gault, 387 U.S. 1, 55 (1967); Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Haley v. Ohio, 332 U.S. 596, 599-600 (1948). It is only sensible that one of the "special" considerations given to a juvenile's confession should be to determine whether a request for his probation officer which precedes the statement must be regarded as a request for the juvenile equivalent of counsel under the circumstances. In fact, any other conclusion would raise juveniles to adult standards instead

of insuring that special factors be considered for minors.

Furthermore, the very exchange quoted in the petition for writ of certiorari, pp. 7-8, reflects Michael's hesitance to willingly cooperate with police interrogation. The minor shows a fear of the police tricking him; he only says he "might" talk to the police; and he disclaims any knowledge of any murder. These facts establish that even under a general voluntariness test, the confession which followed was involuntary and should not have been admitted.

Therefore, under the "express terms and logic" of Miranda, the request for the probation officer by this minor, and the full context of that request, demonstrate that Michael indicated in several different manners his wish to remain silent. This is far from a "radical departure" from Miranda; it is, instead, the logical corollary of Miranda as applied to juveniles.

Petitioner claims that this case will create "confusion" as to what constitutes a proper waiver of constitutional rights by going beyond Miranda (Petition for writ of certiorari, p. 15), and that the per se exclusionary rule of this case will "unreasonably hamper" law enforcement and probation officers in their investigative efforts. Petition for writ of certiorari, p. 13. It is not clear precisely what "confusion" petitioner fears, for in California it is no longer open to doubt that the request of a minor for a parent or his probation officer invokes the Fifth Amendment. As has been emphasized, the California Supreme Court was careful to draw the line between asking for just anyone, and asking for a "trusted guardian figure who exercises the authority of the state as parens patriae." In re Michael C., supra, 21 Cal.3d 471, 476. Petitioner also fails to explain how the per se rule will hamper law enforcement investigation, except insofar as any requirement that the police not coerce statements from suspects "hampers" police investigation. Petitioner's failure to point to

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other instances in which minors have asked for their probation officers, let alone being able to point to any resulting detriment to legitimate law enforcement investigation, belies any claim that this decision will have much impact nationwide.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court deny the petition for writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

PRELIMINARY STATEMENT

Petitioner requests leave of Court to submit the following reply memorandum pursuant to Rule 24(4) of the Rules of the Supreme Court. This memorandum is submitted in reply to arguments raised in respondent's memorandum entitled "Reasons Why a Writ of Certiorari Should Not Be Granted."

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

ARGUMENT

I.

THE INSTANT CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION

Petitioner maintains that the instant decision of the California Supreme Court presents a substantial federal constitutional question which should be resolved in this Court. Respondent challenges this position and argues that the questions raised are merely academic and episodic, and further that it is based on the unique role of the probation officer in California and not on the Federal Constitution. Respondent asserts that during interrogation requests by suspects for the presence of persons other than attorneys occur very infrequently. Petitioner submits that this conclusion does not follow from what respondent characterizes as "only a handful of reported cases" on the subject. The vast majority of cases dealing with requests

for persons other than attorneys may never reach the appellate courts. Obviously in California the law now appears to be settled as to a minor's request for a parent or a probation officer, and such cases would be disposed of in the trial court. (*In re Michael C.* (1978) 21 Cal.3d 471 [146 Cal. Rptr. 358, 579 P.2d 7]; *People v. Burton* (1971) 6 Cal.3d 375 [99 Cal. Rptr. 1, 491 P.2d 793[.) Moreover, it is virtually impossible to speculate as to the effect a single decision such as *In re Michael C.* may have on police investigations. Presumably, where a minor asks for a probation officer in California, police now cease interrogation and an otherwise involuntary confession may never be obtained, let alone sought to be introduced into evidence.

Contrary to respondent's position that the issue is insignificant because so few cases have dealt with it, there appears to be a growing number of recent decisions involving requests for persons other than attorneys. In addition, the various states are in conflict as to how to apply the *Miranda* ruling to such requests. In California the rule is that a minor invokes his Fifth Amendment privileges if he asks for a parent (*People v. Burton, supra,* at p. 382), or if he asks for a probation officer. (*In re Michael C., supra,* at p. 473-478.) He does not, per se, invoke the Fifth Amendment if he asks for any responsible adult such as, for example, his clergyman. (*In re Michael C., supra,* at p. 477.) As respondent notes, other courts outside of California have dealt with the question of requests by minors for their parents and have ruled that such requests do not per se invoke the Fifth Amendment. (*See Chaney v. Wainwright* (5th Cir. 1977) 561 F.2d 1129, 1132; *State v. Young* (Kan. 1976) 220 Kan. 541, 555 [552 P.2d 905, 916]; *People v. Riley* (Ill. 1977) 49 Ill. App.3d 304 [364 N.E.2d 306], cert. den. (1978) 98 S.Ct. 1657.) However,

some states have held that consultation with a responsible adult is a prerequisite to a minor's waiver of his Fifth Amendment rights. (*See, e.g., State in Interest of Dino* (La. 1978) 359 So.2d 586, 592-594; *Commonwealth v. Jamison* (Pa. 1977) 474 Pa. 541 [379 A.2d 87, 87-89]; *Lewis v. State* (Ind. 1972) 259 Ind. 431 [288 N.E.2d 138, 142]; *Freeman v. Wilcox* (Ga. 1969) 119 Ga. App. 325 [167 S.E.2d 163, 166-167].) A majority of jurisdictions allow a minor to waive his Fifth Amendment rights without mature guidance and treat the waiver as a factual matter to be decided by the trier of fact in each case. (*See State in Interest of Dino, supra,* at p. 593, fn. 19, and discussion in *State v. Gullings* (Or. 1966) 244 Or. 173 [416 P.2d 311, 315].)

Thus, the instant issue is neither "episodic" nor "merely academic" but rather involves an important question under the Fifth Amendment, *i.e.*, whether the rule announced in *Miranda v. Arizona* excluding statements obtained where a suspect has been denied his request for the presence of counsel applies to denials of requests for persons who are incapable of providing the guiding hand of legal counsel. A minor is not, as a matter of law, incapable of making a voluntary confession. (See discussion in *In re Gault* (1967) 387 U.S. 1, 44-56.) Voluntariness in each case must be judged on the basis of the total circumstances including the minor's age and maturity. A minor who is sufficiently mature to voluntarily waive his right to remain silent could certainly benefit from the advice of counsel in the same manner as an adult suspect. However, the presence of a non-attorney so-called "responsible-adult" would not be able to provide the assistance contemplated by the *Miranda* court.

Respondent finds support for his position in the fact that this Court denied a petition for a writ of certiorari in *Riley*

v. Illinois, supra, (1978) 98 S.Ct. 1657. However, in *Riley* the state court had declined to expand the *Miranda* exclusionary rule and held that a minor did not invoke his *Miranda* rights when he asked to see his father during interrogation. The *Riley* court cited California's *People v. Burton*, but declined to follow it. (364 N.E.2d 306 at p. 309.) The Illinois rule is that there is no right to a parent or responsible adult present during interrogation. (*See People v. Pierre* (Ill. 1969) 114 Ill. App.2d 283 [252 N.E.2d 706, 710].) This Court's denial of a writ of certiorari in the *Riley* case was consistent with a policy of not extending the *Miranda* exclusionary rule beyond its original doctrinal moorings. (*See also, Michigan v. Mosley* (1975) 423 U.S. 96, 104-107; *Oregon v. Hass* (1975) 420 U.S. 714, 719; *Michigan v. Tucker* (1974) 417 U.S. 333, 446-452; *Harris v. New York* (1970) 401 U.S. 222, 225-226.)

It is clear that the instant decision of the California Supreme Court, and that court's decision in *People v. Burton*, are in conflict with the majority of states. It is also clear that there is a minority of states that have departed from the intent of the rule announced in *Miranda v. Arizona* and have done so based on their interpretation of the Federal Constitution. Petitioner submits that the instant case provides an opportunity to give guidance to the states as to the parameters of the *Miranda* exclusionary rule.

Respondent further argues that the instant decision is a narrow one because it emphasizes the role of the probation officer in California, rather than dealing with a factual situation that is likely to recur nationwide. On the contrary, the California Supreme Court's decision is based primarily on what Michael C.'s statements meant in the context of the Fifth Amendment, rather than on what

the probation officer's role would have actually been had the officer been present during interrogation. The court acknowledged that the probation officer is a peace officer and thus an arm of the prosecutorial system, but held that Michael C. did not view his probation officer as such when he made the request. From this reasoning, the California Supreme Court concluded that any minor making such a request per se invokes his Fifth Amendment rights. (*In re Michael C., supra,* at pp. 473-478.)

If probation officers in California were also attorneys and legally entitled to practice law, then one could conclude that the instant decision is unique and in fact is consistent with the rule announced in *Miranda*. However, probation officers in California have no such unique status, and what the California Supreme Court has done is extend that aspect of the *Miranda* rule that deals with requests for counsel to requests for someone other than counsel — someone who has none of the special qualities of counsel that this Court found important when it rendered its decision in *Miranda v. Arizona*.

II.
THE RULING OF THE CALIFORNIA SUPREME COURT WAS BASED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY

Petitioner submits that the instant case is a proper subject of review by this Court because the decision below was based exclusively on federal constitutional authority. The juvenile court order of wardship, which was based on the finding that respondent committed an act of murder, was reversed by the California Supreme Court on the ground that respondent's confession was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, and the

Fifth Amendment to the Federal Constitution. In the petition for writ of certiorari, petitioner has asserted not only that there are no express references to state statutory or constitutional grounds in the decision below, but also that even the state cases cited by the California Supreme Court were interpretations solely of *Miranda* and the Federal Constitution. (Petn. pp. 15-16.)

Respondent nowhere controverts petitioner's assertion but claims, nevertheless, that this Court should not issue a writ of certiorari without first remanding the matter to the California Supreme Court to ascertain whether that court's decision was based independently on the California Constitution.

Petitioner notes that in *California v. Krivda* (1972) 409 U.S. 33 and *Ohio v. Gallagher* (1975) 425 U.S. 257, which respondent cites in support of remand for clarification, the state opinions under review contained express references to state law which could have been the basis for the state judgment.[1]

Similarly, in *State of Minnesota v. National Tea Company* (1940) 309 U.S. 551 and *Department of Mental Hygiene of California v. Kirchner* (1965) 380 U.S. 194, the uncertainty as to whether the state judgment was based on state law or the United States Constitution was clearly contained in language within the four corners

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[1] In *California v. Krivda, supra,* (1972) 409 U.S. 33, at 35, it was noted that the lower court opinion cited a state case which relied specifically on both state and federal constitutions.

In *Ohio v. Gallagher, supra,* (1975) 425 U.S. 257, the order of remand noted that the Ohio Supreme Court opinion framed the issue as a question of defendant's rights under the Ohio and United States Constitutions, and that the syllabus of the case could be interpreted as indicating that the ultimate decision was based on criminal law and evidence rather than on any federal constitutional consideration.

of the state judgment.[2] By contrast the decision of the California Supreme Court which petitioner seeks to be reviewed contains no reference whatsoever to state constitutional authority.

Notwithstanding the above, respondent asserts that the California Supreme Court frequently refers to a provision of the United States Constitution for convenience although it intends to base its ruling on the California constitutional counterpart guarantee as well. This assertion is based on *People v. Cook* (1978) 22 Cal.3d 67, 81, fn. 4 [148 Cal. Rptr. 605, _____ P2d _____.], where the California Supreme Court stated:

> "In *Theodor* [Theodor v. Superior Court (1972) 8 Cal.3d 77 (104 Cal. Rptr. 226, 501 P.2d 234)] the phrase 'Fourth Amendment' was used for convenience to refer to both the Fourth Amendment to the United States Constitution and the similar provision of article 1, section 13, of the California Constitution. (See, e.g., *People v. Triggs* (1973) 8 Cal.3d 884, 891-892, fn. 5 [106 Cal. Rptr. 408, 506 P.2d 232].) As will

[2]In *Department of Mental Hygiene of California v. Kirchner, supra,* (1965) 380 U.S. 194, at 198-200, the California Supreme Court opinion indicated that a prior case, which had been based on federal constitutional provisions, was dispositive, but proceeded to cite additional cases which were based on both state and federal constitutional provisions.

In *State of Minnesota v. National Tea Company, supra,* (1940) 309 U.S. 551, reference had been made below to cases dealing with both state and federal constitutions. Moreover, the state court had framed the issue as a question involving both federal and state constitutional provisions.

> appear, the decision herein is based solely on the latter provision."

It should be noted, however, that while there are references in *Theodor, supra,* to the Fourth Amendment, the court in that opinion decided the issue before it on statutory grounds and expressly declined to reach any federal or state constitutional issue. (*Theodor v. Superior Court, supra*, at 90.) Since there was no express interpretation in *Theodor* of either the Fourth Amendment to the United States Constitution or its California constitutional counterpart (article 1, section 13) the reference to *Theodor* in *People v. Cook, supra,* may not be interpreted as indicating that any citation by a California court of federal constitutional provision creates an ambiguity as to whether reference is also made to a similar provision in the California Constitution.

It is true that in *People v. Triggs, supra,* (1973) 8 Cal.3d 884, 891-892, fn. 5, the California Supreme Court noted that the court often referred to both state and federal constitutional protections against unreasonable searches and seizures under the rubric of "Fourth Amendment" rights. However, the court in *Triggs, supra,* expressly stated that its ruling was based on its own determination of the proper construction of article 1, section 19 of the California Constitution. Respondent has cited no case where, in the absence of ambiguous language in the original opinion, an opinion was held in a later opinion to have been based independently on both state and federal constitutional authority. Petitioner submits, moreover, that the California courts have not stated that citations to the "Fifth Amendment" for convenience also include reference to similar California constitutional provisions. In *People v. Pettingill* (1978) 21 Cal.3d 231, 251 [145 Cal. Rptr. 861, 578 P.2d 108], the California high court

declined to follow this Court's ruling in *Michigan v. Mosley* (1975) 423 U.S. 96, but rather adopted its prior holding in *People v. Fioritto* (1968) 68 Cal.2d 714 [68 Cal. Rptr. 817, 441 P.2d 625], and determined on independent state grounds that the California Constitution precluded admission of evidence obtained after invocation of *Miranda* rights even where the suspect subsequently waived his rights. In his dissent in *Pettingill, supra,* at pages 252-253, Justice Clark pointed out the fact that the *Fioritto* opinion was based on the California court's interpretation of *Miranda* as an interpretation of the Fifth Amendment to the United States Constitution, and that *Fioritto* made no mention of the California Constitution. Notwithstanding this criticism, the majority in *Pettingill* declined to state that the references in *Fioritto* to the "Fifth Amendment" was a convenient means to refer to both federal and state constitutional provisions. Nor did the court indicate in retrospect that *Fioritto* was based on the California Constitution.[3]

Petitioner submits that the instant matter should not be remanded without some language within the four corners of the state opinion indicating at least some ambiguity as to its constitutional or statutory basis. The opinion in the instant case is remarkable for its lack of ambiguity in this regard. Accordingly, petitioner submits that the matter is properly before this Court for review.

III.

THE RECORD BELOW DOES NOT SUPPORT RESPONDENT'S CONTENTION THAT THE INSTANT DECISION CAN BE SUSTAINED ON GROUNDS OTHER THAN WHETHER A REQUEST FOR A PROBATION OFFICER IS AN INVOCATION OF THE FIFTH AMENDMENT

Respondent contends that the instant decision of the California Supreme Court can be sustained on other

[3]It should be noted that the citation to *People v. Fioritto* in *In re Michael C.*, herein (Petn. App. A, p. 22) is solely to that portion of the opinion establishing the refusal to sign a waiver of his constitutional rights as an invocation of his privilege (*People v. Fioritto, supra,* 68 Cal.2d 714, 719) and not a citation to that portion of the opinion adopted on independent state grounds in *People v. Pettingill, supra*.

grounds than whether a request for a probation officer is per se an invocation of the right to silence. Respondent argues that some of his statements during interrogation could be interpreted as a direct invocation of his Fifth Amendment rights and he argues that his confession was induced by "threats" and "promises." Petitioner submits that this contention does not justify denial of a writ of certiorari in the instant case.

As respondent concedes, the decision of the California Supreme Court below was based solely on the request for a probation officer during custodial interrogation. (Petn., App. A.) The California Court of Appeal, when affirming the judgment, considered this other contention in light of the record and concluded that respondent did not invoke his right to silence nor was his confession the product of any threats or promises. Having determined that the trial court's factual findings were supported by the record, the Court of Appeal decided the issue in favor of the People. (Petn., App. B., p. 38; see *People v. Duren*, 9 Cal.3d 218, 238 [107 Cal. Rptr. 157, 507 P.2d 1365] in California, a trial court's findings respecting the voluntariness of a confession are binding on appeal if supported by substantial evidence in the record).)

The transcript of the tape-recorded interview of respondent which is challenged here included the following:

> "Q. No, look, you can tell us what you did, like the fact that you drove up there; right?
>
> A. Yeah.
>
> Q. Okay, tell us about what you did.
>
> A. Nothing, just heard the shot and (Unintelligible) . . .
>
> Q. Okay, now before, what was you going to that area for? *[sic]*

A. You never know until you get into it, like you said.

Q. Well, that's right, you know (Unintelligble *[sic]*) . . . . you were out there just burglarizing or what?

A. (Unintelligible) . . . just driving around town.

Q. Okay.

A. Hey, man (Unintelligible) . . . tell nobody what I've been telling you, man.

Q. (Unintelligible) . . . no way. No way (Unintelligible) . . .

A. (Unintelligible) . . .

Q. (Unintelligible) . . . Jerry will come in just a minute (Unintelligible) . . . He'll let us out. I told Jerry (Unintelligible) . . . I wanted my coffee, so he'll be in here in just a minute. Jerry, I want my coffee. Okay, but anyway, tell us what you were just driving around the area for that night.

A. Yeah.

Q. And so you know what street it happened on, don't you?

A. No.

Q. You aren't familiar with the area? Were you over to your sister's house (Unintelligible) . . . real close to your sister's house; right?

A. I wasn't over there, no.

Q. Oh, got our coffee (Unintelligible) . . . no, not yet. I'll go get it (Unintelligible) . . . Okay,

just a minute. Okay, Michael, let me say something to you. You got a good chance that you can come out of this thing pretty good.

A. (Unintelligible) . . . bullshit, man.

Q. But don't screw yourself up, because you knwo *[sic]* what's going to happen. You know and I know. You know why we got all of you in here.

A. Yeah.

Q. Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hassled.

A. Well, man, put it like this (Unintelligible) . . . take your word for that because, see, I know I've been that there situation, what you just told me. They say that to just get you to cop out and then they'll back whatever you want to call it. They'll fuck you (Unintelligible) . . . just to hear you talking (Unintelligible) . . .

Q. Micke *[sic]* (Unintelligible) . . . coffee here (Unintelligible) . . . they are going to bring it into the office. You want a sip? Do you like coffee (Unintelligible) . . . Tell me, Mike, when you were driving around that night (Unintelligible) . . . had the gun, right? What kind of gun is it?

A. Thirty-two." (S.T. pp. 14-16.)[4]

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[4]"S.T." refers to "Statement Transcript" admitted as Petitioner's Exhibit 18 in the trial court and which was included as part of the record before the California Supreme Court.

While it is true that when the interrogating officer stated, "Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled" he may have implied that respondent might benefit by cooperating, respondent's answer to the comment belies any inference that respondent was tricked or coerced into a confession. In *Miranda*, this Court stated "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver [of his rights], will of course, show that defendant did not voluntarily waive his privilege." (*Miranda v. Arizona, supra,* (1966) 384 U.S. 436, 476.) In the instant case, respondent had already waived his rights under *Miranda* before the challenged statement of the probation officer was made. Furthermore, respondent's reply of disbelief amply supports the implicit finding of the trier of fact that respondent's confession was not the result of any trickery.

In *United States v. Washington* (1977) 431 U.S. 181, 187-188, this Court stated:

> "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. See *Garner v. United States*, 424 U.S. 648 (1976), *Beckwith v. United States*, 425 U.S. 341 (1976), *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-227 (1973) . . . . The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne. *Rogers v. Richmond*, 365 U.S. 534, 544, (1961)."

In the present case the trial court implicitly found on the basis of substantial evidence that the free will of respondent had not been overborne by the police.

Clearly, an appellate court is not in the same position as a trial court to determine whether a statement is voluntary. The trial court may view the witnesses' demeanor, assess the suspect's age and maturity, and view the totality of circumstances surrounding the interrogation. Petitioner submits that implicit in the California Supreme Court's decision is the concept that these factual questions were resolved adversely to respondent below. The California Supreme Court's decision was based solely on the question of law raised in the petitions filed with that court.

The decision below extends the *Miranda* exclusionary rule and is based on federal constitutional authority. Respondent's contention that the decision could have been based on other grounds is of little importance to the instant petition for a writ of certiorari. The fact is that the trial and appellate courts of California have not made the factual findings necessary to support respondent's position. Moreover, the more important fact is that California has fashioned a federal constitutional rule which, unless overturned by this Court, will serve as an important precedent in future cases. That rule is contrary to the decisions of this Court and will severely hamper the proper investigative role of law enforcement. The decision of the California Supreme Court is thus properly the subject of review by way of a writ of certiorari.

CONCLUSION

For the foregoing reasons petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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In the Supreme Court of the United States

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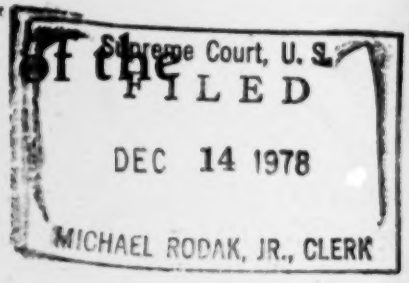
No. 78-334



KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM 1978
No. 78-334

KENNETH F. FARE,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority, concurring and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix A to the Petition for Writ of Certiorari, are reported as *In re Michael C.* (1978) 21 Cal.3d 471, 146 Cal. Rptr. 358, 579 P.2d 7. The opinion of the California Court of Appeal for the Second Appellate District, Division Three, reported and then vacated, which affirmed the order of wardship, appears as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3) to review a judgment of the California Supreme Court which was entered on May 30, 1978, and became final on June 29, 1978. This judgment was a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution. The Petition for Writ of Certiorari was filed on August 28, 1978, and was granted on October 30, 1978.

QUESTIONS PRESENTED

When a juvenile requests the presence of his probation officer during the course of a custodial interrogation, does the Fifth Amendment as interpreted in *Miranda v. Arizona* (1966) 384 U.S. 436, require the cessation of all further interrogation and the suppression of evidence of statements obtained following denial of the request?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATUTES INVOLVED

18 United States Code, Section 3501

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence

of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a

defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer."

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention."

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

California Penal Code, Section 187, in relevant part:

"(a) Murder is the unlawful killing of a human being, or fetus, with malice aforethought. . . ."

California Penal Code, Section 830.5, in relevant part:

"(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only (1) to conditions of parole or of probation by any person in this state on parole or probation; (2) to the escape of any inmate or ward from a state institution; (3) to the transportation of such persons; and (4) as provided in Section 8597 or 8598 of the Government Code, or when acting pursuant to Section 8617 of the Government Code. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment. . . ."

California Welfare and Institutions Code, Section 602:

"Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

California Welfare and Institutions Code, Section 650:

"(a) A proceeding in the juvenile court to declare a minor a dependent child of the court or

a ward of the court under Section 601 is commenced by the filing with the court, by the probation officer, of a petition, in conformity with the requirements of this article.

"(b) A proceeding in the juvenile court to declare a minor a ward under Section 602 of the court is commenced by the filing with the court, by the prosecuting attorney as petitioner, of a petition, in conformity with the requirements of this article."

Former California Welfare and Institutions Code Section 650 (in effect when the instant proceedings commenced in the trial court):

"A proceeding in the juvenile court to declare a minor a ward or a dependent child of the court is commenced by the filing with the court, by the probation officer, of a petition, in conformity with the requirements of this article."

(Cal. Stats. 1961, ch. 1616, § 2, p. 3477.)

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent is a minor who was committed to the California Youth Authority as a ward of the Superior Court of the State of California for the County of Los Angeles on May 10, 1976, following the juvenile court's finding under California Welfare and Institutions Code section 602 that respondent had committed murder in violation of California Penal Code section 187. (A, pp. 4-10.) [1]

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[1] "A" refers to the Appendix prepared following the granting of the writ of certiorari and filed under separate cover.

On January 24, 1977, the Court of Appeal of the State of California, Second Appellate District, Division Three, affirmed the judgment in a unanimous opinion. (Pet. For Cert. App. B.)

Respondent's application to the California Supreme Court for a hearing was granted, and on May 30, 1978, that court in a divided opinion reversed the judgment on the ground that the interrogation of respondent following the denial of his request to see his probation officer constituted a violation per se of the requirements laid down in *Miranda v. Arizona* (1966) 384 U.S. 436. (Petn. for Cert., App. A.)

Petitioner's application for stay of issuance of the remittitur and for an order deferring the execution and enforcement of the judgment was denied by the California Supreme Court on June 29, 1978. Three of the seven justices of the court were of the opinion that the application should have been granted. On July 28, 1978, Mr. Justice Rehnquist ordered enforcement of the judgment of the California Supreme Court stayed pending timely filing and disposition by this Court of a petition for a writ of certiorari, and further ordered that upon the granting of the petition, the stay would remain in effect until this Court decided the case or otherwise ordered. The petition for writ of certiorari was filed on August 28, 1978, and granted on October 30, 1978.

B. Statement of Facts Adduced at the Juvenile Court Adjudication Hearing

On January 19, 1976, at approximately 9:30 p.m., Helen Yeager arrived at her home located at 8939 Paloma Avenue in Los Angeles County, State of California. She was accompanied by her husband. Mrs. Yeager then left the house for about seven minutes to look for the family

dog. As she left, she observed respondent standing across the street from her house. When she returned, she found a trail of blood leading to her husband's dead body which lay in a pool of blood inside the house. (RT pp. 90-92.)[2] Mr. Yeager had been killed by a gunshot wound to the neck. (RT pp. 112-113.)

John Dennis Sheehan, a neighbor of the Yeagers', saw a vehicle with three occupants arrive at the Yeager house at approximately 9:30 p.m. on January 19, 1976. (RT pp. 243-248.) Mr. Sheehan then observed Mrs. Yeager leave, and subsequently he heard a loud noise (like a bang) coming from the Yeager house. (RT pp. 279-282.)

On February 4, 1976, respondent had a conversation with a Los Angeles police officer at a police station in Van Nuys, California. After advising respondent of his constitutional rights, the interrogating officer continued the conversation as follows:

> Q. . . . Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. Can I have my probation officer here?
>
> Q. Well I can't get a hold of your probation

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[2] "RT" refers to the "Reporter's Transcript" of the trial court proceedings which was included as part of the record before the California Supreme Court.

officer right now. You have the right to an attorney.

A. How I know you guys won't pull no police officer in and tell me he's an attorney?

Q. Huh?

A. [Repeat of last answer.]

Q. Your probation officer is Mr. Christiansen.

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you.

(A, pp. 54-55; *see also In re Michael C.* (1978) 21 Cal.3d 471, 473-474, 146 Cal. Rptr. 358, 579 P.2d 7.)

Later during the interrogation, respondent confessed to the offense. (A, pp. 65-81; *In re Michael C., supra,* at p. 474.)

Charles P. Christiansen, respondent's probation officer from a previous offense, stated that he had counseled respondent as to family problems and had told respondent to contact him whenever resondent had contact with the police (A, p. 27.) He never told respondent that he was not supposed to talk to the police. He told respondent that he should not admit openly to an offense without some advice from his parents or a lawyer. (A, pp. 29-30.)

No affirmative defense was presented at the hearing on the factual basis for the petition filed under California Welfare and Institutions Code section 602. (RT p. 409.)

SUMMARY OF ARGUMENT

I.

A criminal suspect does not invoke his right to silence under *Miranda v. Arizona* unless he remains silent or otherwise expresses his intent not to speak. Because of the severe consequences on law enforcement of an inflexible rule such as that imposed by *Miranda,* police officers must be afforded an opportunity to ascertain whether an ambiguous response to a *Miranda* advisement constitutes an expression of a suspect's desire not to speak. Respondent-minor's request to see his probation officer in the instant case was an ambiguous statement which failed to express a clear desire not to speak. Since further inquiries by the police revealed the minor's willingness to speak, respondent's subsequent confession was therefore not vitiated by any invocation of his right to remain silent.

Where a suspect has not clearly expressed a desire to remain silent, his confession is admissible if: (a) he is sufficiently informed of his right to counsel and against self-incrimination to permit him to make a knowing and intelligent decision to speak or to remain silent; and (b) the circumstances attending his interrogation are free of coercion which would override his free will. Respondent-minor was fully advised of his rights under *Miranda* and was able knowingly and intelligently to waive them. The totality of circumstances attending the interrogation indicate the absence of coercion. Respondent's confession was therefore admissible as a voluntary statement.

II.

The Fifth Amendment does not require that minors be afforded the presence of a non-attorney adult advisor during custodial interrogation. The denial of a request for such an advisor is but one factor to be considered in determining the voluntariness of a minor's confession. Because respondent-minor knowingly and intelligently waived his *Miranda* rights under circumstances which indicated a lack of compulsion, the denial of his request for a probation officer did not vitiate his confession.

ARGUMENT

In *Miranda v. Arizona,* (1966) 384 U.S. 436, this Court established the procedural requirement that the custodial interrogation of a suspect by a police officer be preceeded by advisement and waiver of the right against self-incrimination including the right to have counsel at the interrogation. Violation of the procedural requirements set down in *Miranda* have a harsh result on law enforcement in that even the most heinous of crimes may go unprosecuted if a confession, which is in fact voluntary, is rendered inadmissible into evidence because of a technical *Miranda* defect.

A major criticism of *Miranda* was that it would measurably weaken the ability of the criminal justice system to perform the task of protecting the community through the apprehension and prosecution of those who violate the law. (*See Miranda v. Arizona supra,* at pp. 539-543 (White, J., dissenting).) Yet this was clearly not the intent of the *Miranda* court which noted:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (*Miranda v. Arizona supra,* at p. 478.)

Due to the potentially serious consequences of the *Miranda* exclusionary rule, countered by the recognized importance of confessions in law enforement, petitioner submits that evidence should not be excluded on techincal *Miranda* grounds in the absence of a clear showing of a *Miranda* violation.

I.

A CRIMINAL SUSPECT DOES NOT EXERCISE HIS RIGHT TO SILENCE UNDER *MIRANDA V. ARIZONA* UNLESS HE STANDS MUTE OR OTHERWISE CLEARLY EXPRESSES HIS DESIRE NOT TO SPEAK

In the present case the California Supreme Court determined respondent's confession to have been obtained in violation of *Miranda v. Arizona, supra,* solely because it held that the police had continued an interrogation after respondent had requested to see his probation officer. The basis for the holding was the court's conclusion that the request for a probation officer constituted conduct which "reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police *at that time" (People v. Randall* (1970) 1 Cal.3d 948, 956 [83 Cal. Rptr. 658, 464 P.2d 114]) and that such a request constituted an invocation of the privilege against self-incrimination. (*In re Michael C.* (1978) 21 Cal.3d 471, 476-478 [146 Cal. Rptr. 358, 579 P.2d 7]; Petn. for Cert., App. A, pp. 23, 25.)

Petitioner submits the holding should be overturned because: (a) the court incorrectly determined that a request for a probation officer was analogous to a request for counsel; and (b) the court followed an erroneous test in assessing the significance of respondent's request for his probation officer.

A. A Suspect's Request for His Probation Officer Does Not Constitute An Invocation of the Right to Silence

In the case at bar, the California Supreme Court held that respondent's request for his probation officer was as much an invocation of his Fifth Amendment privilege as a request for an attorney. (*In re Michael C. supra,* at 477; Petn. for Cert., App. A, p. 25.) The court below would find that such a request from a minor always invokes the right to silence. Petitioner submits that it is unreasonable to place a probation officer in such a role.

This Court, in defining the specific advisements and waivers that are required to be taken prior to the commencement of custodial interrogation, has included the right to consult with counsel prior to questioning and also the right to have counsel present during questioning. (*Miranda v. Arizona, supra,* at pp. 469-470.) While the *Miranda* requirement of a right to counsel has been characterized as a Fifth Amendment right, clearly counsel was singled out by the *Miranda* majority because of the importance of an attorney's role as defined under the Sixth Amendment.[3] This Court noted the important and unique

[3]The *Miranda* court viewed the right to the presence of counsel during custodial interrogation as insurance against an unknowledgeable and unintelligent waiver of Fifth Amendment rights and as a shield against coercion. This Fifth Amendment right to counsel was partly an extension of *Escobedo v. Illinois* (1964) 378 U.S. 478, where the Court held that the Sixth Amendment guaranteed a suspect the right to counsel after he is in custody and a process of interrogation tending to elicit incriminating evidence has begun. (*See* Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona* (1966)14 **UCLA L. REV.** 59, 72; Comment *The New Difinition: A Fifth Amendment Right To Counsel* (1967) 14 **UCLA L. REV.** 604, 607, 623.) Prior to *Escobedo,* neither the Fifth nor Sixth Amendments was expressly used as authority in state confession cases. Rather, this Court relied on a test of "voluntariness"

protections provided by the presence of counsel during custodial interrogation. (*Id.,* at p. 469.)

This judicial merger of Sixth Amendment protections into the penumbra of the Fifth Amendment was perhaps best summarized by the dissenters in *Miranda* who viewed the philosophical basis of the decision with the detachment of literary critics. Mr. Justice Harlan noted that the Sixth Amendment's judicial precedents are the "linchpins" of the *Miranda* confession rules. (*Id.,* at p. 513 (Harlan, J., dissenting).) Mr. Justice White observed:

> ". . . . By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination *the Court has created a limited Fifth Amendment right to counsel — or, as the Court expresses it, a 'need for counsel to protect the Fifth Amendment privilege . . . .'* The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for this installing counsel as the arbiter of the privilege." (*Id.,* at pp. 536-537 (White, J., dissenting) (Emphasis added).)

which included some reference to Fifth Amendment privileges, but allowed courts the flexibility to review the totality of the circumstances surrounding each confession. (*See,* e.g., *Haynes v. Washington* (1963) 373 U.S. 503; *Culombe v. Connecticut* (1961) 367 U.S. 568; *Rogers v. Richmond* (1961) 365 U.S. 534.)

If, as Mr. Justice White would have held, the Fifth Amendment did not warrant a rule installing counsel as the arbiter of the privilege, *a fortiorari,* it would not warrant installing a probation officer, a relative, or any other non-attorney advisor as the arbiter of the privilege. However, even under the *Miranda* majority's holding that counsel is essential to protect Fifth Amendment rights, it is clear that the reference is to *legal* counsel who possesses the training and nearly absolute duty to protect his client. *Miranda* does not call for the creation of a class of surrogate attorneys consisting of any persons the suspect may consider to be an advisor.

The California Supreme Court erroneously held that respondent-minor's relationship with his probation officer was similar to that between a defendant and counsel. Below, the court held:

> "In view of the emphasis which the juvenile court system places upon the close relationship between a minor and his probation officer, and in light of the probation officer's instructions in the present case that his ward contact him immediately in case of trouble, the 'normal reaction' of the minor here would be to request consultation with his probation officer. Fearing that the police would take advantage of his ignorance, Michael wanted and needed the advice of someone whom he knew and trusted. He therefore asked for his probation officer — a personal advisor who would understand his problems and needs and on whose advice the minor could rely." (Footnotes omitted) (*In re Michael C., supra* at p. 476; Petn. for Cert., App. A, p. 23.)

Quite apart from the fact that the record in this case does not establish respondent's fear of the police, ignorance of the law or trust in his probation officer, it is submitted that

the particular factual findings of the court in the present case do not support the establishment of a per se rule that a minor's request for his probation officer constitutes an invocation of his *Miranda* rights.

The probation officer requested by Michael C. was a peace officer. In California, probation officers act as an arm of the prosecutorial system and cannot be advocates or act as legal counsel during interrogation. (*See* Cal. Pen. Code § 830.5; Cal. Welf. & Inst. Code § 283.) In fact, it was the Acting Probation Officer of Los Angeles County who, pursuant to his statutory responsibility, initiated the instant proceedings and brought the instant charges relating to respondent in the trial court. (A, pp. 4-5.) If respondent's probation officer had been present during interrogation he would have been there as a law enforcement officer. (*See In re Steven C.* (1970) 9 Cal. App.3d 255, 263-266 [88 Cal. Rptr. 97].) If respondent had made a confession to his probation officer, the officer would have been required to give respondent the *Miranda* admonitions. (*Cf. In re Paul T.* (1971) 15 Cal. App.3d 886, 893 [93 Cal. Rptr. 510].) While an attorney could counsel a suspect to remain silent, "the probation officer must counsel his charge to be cooperative [with the police] and to help solve the crime, even if by doing so the minor implicates himself in a serious felony." (*In re Michael C., supra,* at p. 479; Petn. for Cert., App. A, pp. 27-28 (Mosk, J., concurring).) Respondent was fully aware of the fact that his probation officer was a peace officer and thus could not act as legal counsel. (A, p. 29.)

California is by no means unique in conferring peace officer status on juvenile probation officers. Petitioner submits that no jurisdiction grants attorney status to probation officers. Twenty jurisdictions designate probation officers as having the authority of a law enforcement

officer.[4] Four jurisdictions state that probation officers do not have the authority of law enforcement officers, but nevertheless do provide them with some degree of power to take juveniles into custody.[5] Seventeen jurisdictions provide probation officers with the authority to arrest with or without a warrant.[6] Eight jurisdictions provide proba-

[4] Arizona: Ariz. Rev. Stat. § 8-205; California: Cal. Penal Code § 830.5 (West); Colorado: Colo. Rev. Stat. § 19-5-102; Connecticut: Conn. Gen. Stat. Ann. § 17-58 (West); Delaware: Del. Code tit. 11, § 4321; District of Columbia; D.C. Code Encycl. § 11-1524 (West); Hawaii: Haw. Rev. Stat. § 571-85; Idaho: Idaho Code § 16-1820; Iowa: Iowa Code Ann. § 231.10 (West); Kentucky: Ky. Rev. Stat. § 208.320; Massachusetts: Mass. Gen. Laws Ann. ch. 276 § 90; Minnesota: Minn. Stat. Ann § 260.311; Missouri: Mo. Ann. Stat. § 211.401 (Vernon); Nevada: Nev. Rev. Stat. §§ 62.120 and 62.122; New York: N.Y. Exec. Law § 257 (McKinney); N.Y. Crim. Proc. Law § 1.20; North Carolina: N.C. Gen. Stat. § 110-23; Oregon: Or. Rev. Stat. § 419.610; South Carolina: S.C. Code § 15-1377; South Dakota: S.D. Compiled Laws Ann. § 26-7-9; Texas: Texas Ann. Civ. Stat. art. 5142 (Vernon).

[5] Indiana: Ind. Code Ann. §§ 31-5-7-12 and 33-12-2-22 (Burns); New Mexico: N.M. Stat. Ann. § 13-14-8; North Dakota: N.D. Cent. Code § 27-20-06; Tennessee: Tenn. Code Ann. § 37-206.

[6] Alaska: Alaska Stat. § 47.10.20; Illinois: Ill. Ann. Stat. ch. 38 § 204-3 (Smith-Hurd); Louisiana: La. Rev. Stat. Ann. § 13:1587 (West); Maine: Me. Rev. Stat. tit. 34 § 1682; Nebraska: Neb. Rev. Stat. § 29-2216; and Neb. Rev. Stat. §§ 29-2258 and 29-2266; New Hampshire: N.H. Rev. Stat. Ann. § 504:4; New Jersey: N.J. Stat. Ann. § 2A: 168-4 (West); Ohio: Ohio Rev. Code Ann. § 2151.14 (Page); Oklahoma: Okla. Stat. Ann. tit. 10 § 1205 (West); Rhode Island: R.I. Gen. Laws § 14-1-33; United States: U.S.C.A. tit. 18 § 3653 (West); Utah: Utah Code Ann. § 78-3a-29; Vermont: Vt. Stat. Ann. tit. 28 § 301; Virginia: Va. Code § 16.1-237; Washington: Wash. Rev. Code Ann. § 13.04.040; Wisconsin: Wis. Stat. Ann. § 54.15 (West); Wyoming: Wyo. Stat. § 7-31.

tion officers with limited authority to take a juvenile into custody.[7] Two jurisdictions do not provide the probation officers with either the authority to arrest or take a juvenile into custody unless requested to do so by the court.[8] Only one jurisdiction specifically states that juvenile probation officers do not have the authority of a law enforcement official and yet does not provide probation officers with the authority to take a minor into custody.[9] Thus, to hold that a request for a probation officer's presence is per se both the equivalent of a request for counsel and an invocation of the right to be silent constitutes an absurd extension of the *Miranda* doctrine.

From the foregoing it may be concluded at the very least that the subjective intent of a suspect who requests to see his probation officer cannot be predicted with sufficient certainty to justify the per se rule which the California Supreme Court has established. Petitioner submits, moreover, that inquiries into whether a suspect wishes to speak with his probation officer, parent, coach or clergyman do not reach the fundamental point of *Miranda* which is that interrogation should not be undertaken by the police unless the suspect is informed of his rights and indicates a willingness to speak.

[7] Alabama: Ala. Code § 12-15-7; Florida: Fla. Stat. Ann. § 39.03 (West); Georgia: Ga. Code Ann. § 24A-602: Kansas: Kan. Stat/ Ann. § 38- 814; Maryland: Md. Ann. Code, Cts. and Jud. Procd. § 3-814; Michigan: Mich. Stat. Ann. § 27.3178 (598.14); Montana: Mont. Rev. Codes Ann. § 10-1234; Pennsylvania: Pa. Stat. Ann. tit. 11 § 50-201.

[8] Arkansas: Ark. Stat. Ann. § 45-414; Mississippi: Miss. Code Ann. §§ 43-21-43 and 43-23-43.

[9] West Virginia: W. Va. Code §§ 49-5-8 and 49-5-15.

B. When Given an Ambiguous Response by a Suspect Following a *Miranda* Warning, a Police Officer Should Be Permitted to Make Further Inquiries to Ascertain Whether the Suspect Desires to Remain Silent.

The California Supreme Court found that respondent had invoked his privilege against self-incrimination when he asked for his probation officer because such a request reasonably appeared inconsistent with a present willingness to speak within the meaning of *People v. Randall, supra*, 1 Cal.3d 948, 956. Petitioner submits that because the officer was able, by further conversation with respondent, to determine that respondent did not in fact wish to remain silent, the "reasonable appearance" standard utilized by the court is artificial, confusing and inappropriate for review of *Miranda* cases. This is not to say that when faced with an ambiguous statement the police may trick or cajole a suspect into a waiver of his rights. Rather, petitioner's contention is simply that an interrogating officer faced with an ambiguous statement by a suspect should be permitted to ascertain, by answering the suspect's questions, explaining the suspect's rights or asking additional questions of the suspect, whether the suspect in fact desires to waive his rights. Such a procedure would be consistent with this Court's holding in *Miranda, supra*, at 467, that its ruling was not intended as the sole solution to the problem of compulsion in the interrogation process.

The facts of the present case classically illustrate petitioner's position. Shortly after respondent's arrest, Officer Stanley Miller advised him of his rights.

"BY OFFICER MILLER:

Q. Michael, I'm Investigator Miller, Van Nuys Homicide. This is Investigator Ridenour. Do you know why you're here?

BY MICHAEL CHRISTMAN:

A. No.

Q. I'll tell you why you're here. You're here for a murder investigation. Okay? Now do you understand why you're here?

A. Yeah.

A. [sic] I'm going to advise you of your constitutional rights. I'll advise you that you have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning. Do you understand all of these rights as I have explained them to you?

A. Yeah." (A, pp. 54-55.)

After indicating he understood his rights and might talk, respondent asked if he could have his probation officer present.

"Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?

A. What murder? I don't know about no murder.

Q. I'll explain to you which one it is if you want to talk to us about it.

A. Yeah, I might talk to you.

Q. Do you want to give up your right to have an attorney present here while we talk about it?

A. Can I have my probation officer here?" (A, p. 55.)

Officer Miller indicated the probation officer was not available that evening but would probably be available later. He readvised respondent of his rights, and respondent indicated he wanted to talk.

"Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

A. How I know you guys (Unintelligible) . . . won't call no police officer in and tell me he's an attorney?

Q. Huh?

A. [Repeat of last answer]

Q. Your probation officer (Unintelligible) is Mr. Christiansen?

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you." (A, p. 55.)

Assuming arguendo respondent's initial question regarding his probation officer might "reasonably appear inconsistent with a present willingness to speak" under *People v. Randall, supra,* a fact which petitioner does not concede, surely the subsequent conversation between respondent and Officer Miller indicated respondent was not stating a desire to remain silent.

Officer Miller's statement that he could not get hold of the probation officer immediately was by no means a coercive statement. The California Supreme Court did not criticize as improper his refusal immediately to provide respondent with his probation officer. Indeed, this Court in *Miranda, supra* at pp. 473-474, held that the police are not even required to provide counsel at a suspect's request. From the foregoing it is readily apparent that Officer Miller reacted properly to respondent's ambiguous request and that prior to interrogating respondent, Officer Miller received respondent's unequivocal waiver of his right to silence. Petitioner submits, therefore, that respondent did not invoke his right to silence by asking for his probation officer.

Petitioner submits that rulings such as the California Supreme Court's in the present case will require trial courts and police officers to speculate for each interrogation as to whether a request for a school coach, clergyman or any other person constituted an expression of the subject's subjective desire to remain silent. This Court should adopt the rule that an interrogating officer faced

with an ambiguous statement may make further inquiries to determine the suspect's desire, whether it be to speak or to remain silent. Under such a rule the admissability of statements would no longer be determined by the fact that a suspect did or did not utter certain "magic words," the significance of which may be understood by neither the suspect nor the interrogating officer.

The advantage of this simpler rule was cogently stated by Mr. Justice Rehnquist in his order staying the judgment of the California Court:

> "*Miranda v. Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise." (*Fare v. Michael C.* (1978) _____ U.S. _____, 99 S.Ct. 3, 5, (Rehnquist, J., sitting as Circuit Justice).)

Petitioner submits that a single rule permitting interrogating officers at the time of interrogation to obtain clarification of ambiguous statements and requiring cessation of interrogation only when a suspect indicates a desire not to speak will alleviate the need for speculation by the courts without jeopardizing Fifth Amendment rights.[10]

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[10]Since in the instant case respondent's request for his probation officer was not the equivalent of a request for counsel, this Court is not squarely presented with the question of whether a request for counsel constitutes the "magic words" which require immediate cessation of questioning. Petitioner submits, however, that even if respondent had asked if he could have an attorney, no prejudice to his Fifth Amendment rights would have occurred if the officer were permitted to ascertain whether respondent in fact did not wish to speak in the absence of counsel.

C. The Totality of Circumstances Indicates Respondent's Confession Was Voluntary

Petitioner submits that, in the absence of particular words or conduct constituting a per se invocation of the right to be silent, each case must be judged on the totality of the circumstances to determine if the statements in question were voluntary. To that end, the philosophy of the *Miranda* opinion and the requirements of the Fifth Amendment should mandate an affirmative answer to two questions: (1) Was there an absence of coercion sufficient to conclude that the suspect's free will was not overborne? and (2) Was the suspect sufficiently informed to make an intelligent and knowing choice between remaining silent and making a statement?[11]

The constitutional requirement is only that the suspect be not compelled to speak. (*United States v. Washington* (1977) 431 U.S. 181, 188.) That singular Fifth Amendment requirement is satisfied if the answer to the above two questions is "yes." It is satisfied by a process that examines the suspect's free will and intelligence, rather than focus solely on the form of the admonitions. Indeed, *Miranda's* addition to the law of interrogation, is not a requirement that police repeat a particular admonition, but rather that procedures be employed to assure that the custodial setting not be impermissibly coercive and that the suspect be permitted to make an informed choice on whether to invoke his right to be silent. In that respect, *Miranda* merely states what was implicit in several prior decisions. *Miranda* sets forth the constitutional minima:

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[11]In several cases, this Court has noted that *Miranda* warnings are simply a "prophylactic" and are not necessarily indispensable to the Fifth Amendment privilege against self-incrimination. (*See e.g., Brown v. Illinois* (1975) 422 U.S. 590, 600; *Michigan v. Payne* (1973) 412 U.S. 47, 53.) Thus, alternative methods which achieve

> " . . . [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda v. Arizona, supra* at p. 444.)

Considering the first question, this Court acknowledged in *Miranda* that custodial interrogation creates some inherently coercive pressures. (*Id.,* at pp. 445-458.) However the very act of being asked a question by anyone in any setting places some amount of pressure on the subject. He is placed on the spot. He must make the decision whether or not to answer the question and if so, how to answer. The Fifth Amendment does not bar questioning, only the *compelling* of answers. Thus, where the suspect has not per se invoked his right to be silent, the fact finder answers the first question by examining the circumstances surrounding the interrogation. Such factors include the suspect's age, maturity, experience and intelligence, the length of custody as well as the nature of the interrogation. The dispositive question is whether the suspect's free will was overborne. (*See Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

The second question is simply a determination of whether the suspect made an informed choice. Mr. Justice White, in his *Miranda* dissent noted that the central goal

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the underlying policies of the *Miranda* opinion are constitutionally acceptable. (*See Miranda v. Arizona, supra,* at p. 467.) Congress apparently effected a partial return to the pre-*Miranda* standard of voluntariness by enacting legislation to provide that failure to administer *Miranda* warnings is a factor to consider in determining the voluntariness of a statement, but is not dispositive on the question of the statement's admissibility. (18 U.S.C. § 3501.)

of the Fifth Amendment proscription is focused in terms of compulsion, not an whether specific warnings have been given.

> "That amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. . . ." (*Miranda v. Arizona supra,* at p. 536 (White, J., dissenting).)

In the case at bar there is no question *Miranda* admonitions were given and waivers secured. Petitioner submits that where, as here, the prophylactic rules of *Miranda* have been followed, the statements obtained cannot be per se inadmissible and the question of admissability then turns to whether, based on the totality of the circumstances, the statements were voluntary. Thus, petitioner's position is simply that in the absence of particular words or conduct that constitute a per se invocation of the right to be silent as defined in *Miranda v. Arizona supra,* the appropriate standard is "voluntariness," a standard that has long been the accepted rule. (*See Haynes v. Washington* (1963) 373 U.S. 503, 514; *Morales v. New York* (1969) 396 U.S. 102, 104.) If states are free to augment the list of per se invocations of Fifth Amendment privileges, then whatever virtue there is to the fact that *Miranda* establishes precise rules for law enforcement to follow will be lost. In the words of Mr. Justice Rehnquist, ". . . the decision of the California Supreme Court . . . risks cutting *Miranda* loose from its doctrinal moorings." *(Fare v. Michael C., supra,* ____ U.S. ____, 99 S.Ct. 3, 6 (Rehnquist, J., sitting as Circuit Justice).)

Nothing in the opinion of the California Supreme Court below suggests either that respondent was misinformed as to his rights or that any coercive circumstance rendered his confession involuntary. In fact, respondent's comments at the time of the interrogation demonstrate that he was well aware of his rights, and his waiver after multiple advisement of his rights by the interrogating officer was clear and unequivocal.

Petitioner submits that the Fifth Amendment and Fourteenth Amendment prohibition against a state's use of "compelled" statements does not justify the rigid standard set forth by the California Supreme Court. In the absence of a per se invocation of the right to be silent, the test of admissibility should be voluntariness based on the totality of the circumstances.

II.

A MINOR DOES NOT HAVE A FIFTH AMENDMENT RIGHT TO THE PRESENCE OF A NON-ATTORNEY ADULT ADVISOR DURING CUSTODIAL INTERROGATION

The opinions of the California Supreme Court in the case at bar and in the case of *People v. Burton* (1971) 6 Cal.3d 375 [99 Cal. Rptr. 1, 491 P.2d 793], should not be interpreted as fashioning a Fifth Amendment privilege for a minor to have a non-attorney adult advisor present

during custodial interrogation. In *Burton*, the court held that a minor's request for the presence of his parent was an invocation of *Miranda's* Fifth Amendment right to the presence of counsel. (*People v. Burton supra,* at p. 382.) In the instant case, the court below relied on *Burton's* interpretation of the Fifth Amendment to hold that a request for a probation officer invokes the right to be silent. (*In re Michael C. supra,* at pp. 475-476; Petn. for Cert. App. A, p. 22.) Although the California Supreme Court specifically declined to extend the holding to apply to requests for the presence of any adult advisor (e.g., football coach, music teacher or clergyman), the emerging rule appears to make surrogate attorneys out of any adult whose relationship to the minor is recognized in law. Thus, both parents and probation officers, who have legal responsibilities towards the minor, act as "counsel" during interrogation. (*In re Michael C. supra,* at p. 477; Petn. for Cert. App. A at p. 24.) Petitioner submits that nothing in *Miranda* or in the Fifth Amendment suggests that any adult advisor has the capacity to fulfill the important role that legal counsel performs during custodial interrogation. Thus, regardless of what relationship exists between the minor suspect and the adult requested, it is unreasonable to conclude that the request per se invokes Fifth Amendment privileges.

Several states have joined in holding that consultation with a responsible adult is a prerequisite to a minor's waiver of his Fifth Amendment rights. (*See*, e.g., *State in Interest of Dino* (La. 1978) 359 So.2d 586, 592-594; *Commonwealth v. Jamison* (Pa. 1977) 474 Pa. 541 [379 A.2d 87, 87-89]; *Lewis v. State* (Ind. 1972) 259 Ind. 431 [288 N.E.2d 138, 142]; *Freeman v. Wilcox* (Ga. 1969) 119 Ga. App. 325 [167 S.E.2d 163, 166-167].) A majority of jurisdictions allows a minor to waive his Fifth Amendment rights without the presence of an adult

advisor and treats the voluntariness of the waiver as a factual matter to be decided on the circumstances of each case. (*See State in Interest of Dino supra*, at p. 593, fn. 19, and discussion in *State v. Gullings* (Or. 1966) 244 Or. 173 [416 P.2d 311, 315].) Petitioner submits that the latter approach is the more reasonable.

A minor is not, as a matter of law, incapable of making a voluntary confession. (*See* discussion in *In re Gault* (1967) 387 U.S. 1, 44-56.) As the California Supreme Court noted prior to the line of cases challenged at bar:

> "[W]hether a minor knowingly and intelligently waived these [constitutional] rights is a question of fact; and a mere failure of the authorities to seek the additional consent of an adult cannot be held to outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made." (*People v. Lara* (1967) 67 Cal.2d 365, 379 [62 Cal. Rptr. 586, 432 P.2d 202] *cert. denied*, (1968) 392 U.S. 945.)

In the pre-*Miranda* decision of *Gallegos v. Colorado* (1962) 370 U.S. 49, this Court applied the totality of the circumstances test of voluntariness to a confession by a fourteen-year-old minor who was held in custody for five days without being permitted to see a lawyer, a parent or other "friendly" adult, although his mother had attempted to see him. (*Id.*, at pp. 49-55.) Since the presence of a non-attorney so called "responsible adult" cannot provide the legal assistance during interrogation that was contemplated by the *Miranda* court, nothing in *Miranda* changed the totality of circumstances standard of voluntariness employed in *Gallegos*. In a given case, as in *Gallegos*, a request for an adult advisor might be evidence of the suspect's desire not to speak. However, the question is a

factual one in each case, and there is no justification for a per se rule. The youth of the suspect is but one factor in determining whether a waiver was maturely and intelligently made. (*See Haley v. Ohio* (1948) 332 U.S. 596, 599-600.) In a close case dealing with a youthful offender, failure to provide the presence of a parent or guardian may result in a finding that under the circumstances, the waiver was invalid. (*See In re Stiff* (Ill. 1975) 32 Ill. App.3d 971, 978 [336 N.E.2d 619, 625].) However, the constitution does not mandate the right to the presence of anyone other than a lawyer who is trained to protect the legal rights of a suspect during interrogation. Denial of a requested responsible adult is simply one factor in the totality of the case. (*See,* e.g., *Chaney v. Wainwright* (5th Cir. 1977) 561 F.2d 1129, 1131-1132; *People v. Riley* (Ill. 1977) 49 Ill. App.3d 304 [364 N.E.2d. 306], *cert. denied (1978) 98* S.Ct. 1657; *State v. Young* (Kan. 1976) 220 Kan. 541, 555 [552 P.2d 905, 916]; *Brajiel v. State* (Tenn. 1975) 529 S.W.2d 501, 505-506; *Mullin v. State* (Wyo. 1973) 505 P.2d 305, 309, *cert. denied* 414 U.S. 940; *State v. Hogan* (Minn. 1973) 297 Minn. 430 [212 N.W.2d 664, 670-671]; *State v. Hardy* (Ariz. 1971) 107 Ariz. 583 [491 P.2d 17, 17-18]; *State v. Oliver* (Conn. 1970) 160 Conn. 85 [273 A.2d 867, 871], *cert. denied* (1971) 402 U.S. 946; *People v. Pierre* (Ill. 1969) 114 Ill. App.2d 283 [252 N.E.2d 706, 710]; *Mosley v. State* (Ark. 1969) 438 S.W.2d 311, 312; *Stokley v. State of Maryland* (D. Md. 1969) 301 F. Supp. 653, 660.)

If a non-attorney adult advisor is present during the custodial interrogation of a minor, the minor's rights may not be better protected by such presence, since the adult advisor is not competent to give legal advice. In *Ezell v. State* (Okla. 1971) 489 P.2d 781, admission of a minor's statement was held to be error even though his mother was

present when the minor waived his *Miranda* rights. The court noted:

> "We are doubtful if the legal custodian [of the minor] or the mother made any difference as to whether he was afforded his constitutional rights in regard to the confession. It was never shown or was any attempt made to show either was knowledgeable in the law and therefore capable of protecting defendant's constitutional rights." (489 P.2d at p. 783.)

To confer a right to a non-attorney advisor's presence during interrogation would be to depart from the goals of *Miranda* which sought to ensure a suspect the right to someone trained in the law and with the ability to give sound professional advice. (*Miranda v. Arizona supra,* at pp. 480-481.) Petitioner submits that if a minor may knowingly and intelligently waive his rights under *Miranda*, then he is entitled to no special privileges beyond those set forth in *Miranda*. The absence of an adult advisor is merely one factor going to the question of voluntariness. That fact does not, per se, render a subsequent statement constitutionally invalid.

Petitioner submits that respondent did not per se invoke his Fifth Amendment privileges by asking for his probation officer and that neither *Miranda* nor the Fifth Amendment gives a minor a right to the presence of a non-attorney adult advisor during custodial interrogation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the instant opinion and judgment of the California Supreme Court be reversed and that the judgment declaring respondent a ward of the Superior Court be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-334

KENNETH F. FARE,
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Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENT

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IN THE

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OCTOBER TERM, 1978

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Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENT

Miranda v. Arizona, 384 U.S. 436 (1966) held that custodial interrogations inherently coerced confessions from suspects, in the absence of an advisement and waiver of the rights to silence and counsel. In this case, Michael was advised of those rights and was asked to waive them. Michael responded by asking for his probation officer.

Michael's request for his probation officer showed his lack of willingness to discuss the case with the police, and thus invoked his right to silence.

Michael's request for his probation officer also amounted to a request for counsel. As the California Supreme Court held, the special role of a probation officer in California meant that Michael's request for a probation officer was a "call for help," a request for a personal advisor duty-bound to assist Michael, whose presence could dispel the fear involved in custodial interrogations of juveniles. These very roles were relied on in *Miranda* as the reasons why a request for an attorney would invoke the Fifth Amendment.

Upholding the California Supreme Court does not require any "extension" of *Miranda*; it is the only way in which *Miranda* can be applied to juveniles so as to recognize the youth and immaturity of young persons, and to provide the "special considerations" required in reviewing juvenile confessions.

Moreover, Michael's "unequivocal" waiver of his rights was surrounded by no fewer than six expressions of his refusal to waive his rights and his fear of the police tricking him. Apart from the request for his probation officer, Michael repeatedly responded that he did not want to talk to the police, and finally did confess only after being threatened by the police. These constitute independent grounds to suppress the confession as involuntary on the "totality of circumstances" test, apart from any *Miranda* violation.

ARGUMENT

I

MICHAEL'S REQUEST FOR HIS PROBATION OFFICER INVOKED HIS FIFTH AMENDMENT RIGHTS

This court has always carefully examined confessions to insure that coerced, involutary confessions were not admitted at trials. The very integrity of the trial process requires that only evidence with some degree of reliability be usable in trial. This court has recognized that involuntary confessions are not likely to be true, and thus has fashioned a rule barring such statements from evidence. This case involves the voluntariness of a confession admitted as to a juvenile in California.

A. Michael's Request For His Probation Officer Invoked His Right To Remain Silent

The legal test for detemining when a suspect asserts his or her right to silence is whether the defendant indicates in *any manner* that he or she does not wish to be interrogated. *Miranda v. Arizona*, 384 U.S. 436, 445, 473-474 (1966). Did Michael in this case indicate *in any manner* that he did not wish to be interrogated?[1] Michael expressly requested his probation officer when

[1]This discussion is limited to the exchange *prior* to Michael's initial agreement to talk with the police. As discussed in III below, Michael on three occasions asserted his right to remain silent, very clearly, after his initial agreement to talk but prior to any admission as to the offense.

asked to waive his rights. A, at 55.[2] When asked to give up his right to have an attorney present, Michael instantly responded, "Can I have my probation officer here?" A, at 55. This clearly shows that Michael did not want to be interrogated at that moment, at least not without his probation officer. While Michael did not further say "I wish to assert my right to remain silent,"[3] he also did not unequivocally agree to talk. Therefore, Michael indicated, *in some manner*—by asking for his probation officer—a lack of willingness to talk *at that point*. Such a statement is all that is required to invoke the right to remain silent. Under the "express terms" of *Miranda* to find no assertion of the right to silence here.

This is in contrast to petitioner's claim of an "unequivocal waiver" of rights by Michael. Brief for the Petitioner, at 28. A request for a probation officer when a suspect is asked to waive his rights is hardly an "unequivocal waiver." It is in fact no waiver at all; it is *a manner* of indicating lack of willingness to talk.

B. Michael's Request For His Probation Officer Amounted To A Request For An Attorney

In addition to invoking his right to silence, Michael's request for his probation officer *amounted to* a request for counsel. True, Michael never expressly asked for "an attorney." This is understandable in light of what transpired during this interrogation. When told he could have an attorney, Michael asked how he could be

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[2]"A" refers to the Appendix filed under separate cover containing the record relevant to this case.

[3]Though what he said later was so close to such a statement as to be indistinguishable from an assertion of that right. See III below.

sure the police would not bring in a police officer and tell Michael that person was an attorney. A, at 55. Obviously, Michael knew of no attorney personally, and was unwilling to accept an "attorney" provided by the police. Given the admission by the police almost immediately afterward that they do not always play fair (A, at 56), Michael's lack of trust in a police-provided "attorney" is understandable.

Michael's request for his probation officer must be viewed in light of the role he anticipated an attorney would play in an interrogation situation. There is no discussion in *Miranda* of the legal skills of an attorney being necessary to the suspect being interrogated. (Contrary to the suggestion of Justice Rehnquist in his stay order in this case. *Fare v. Michael* C., 99 S. Ct.3, 6 (1978).) Instead, *Miranda* focused on the presence of counsel as being a method of dispelling the fear engendered by the custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 466, 470 (1966). *Miranda* also relied on the duty of an attorney to his client, thus providing someone the suspect could rely on as being on his side during the interrogation. *Miranda v. Arizona*, 384 U.S. 436, 480, (1966).

Now of course *Miranda* did not involve a juvenile, so the court did not discuss the application of *Miranda* to minors. While *In re Gault*, 387 U.S. 1 (1967), applied the Fifth Amendent of the United States Constitution to juveniles, the precise application of *Miranda* was not delineated. Certainly, an attorney would fulfill for a juvenile the roles discussed above for adults. The question is whether a probation officer could similarly perform those functions. This court need not conclude that *every* request by a minor for a probation officer invokes *Miranda*. All it need do is hold that a request

for a probation officer by a minor asked to waive his rights during custodian interrogation *in California* amounts under *Miranda* to a request for an attorney.

In this case the California Supreme Court analyzed the significance of the request for a probation officer in California. The court noted the "close relationship" between minors and probation officers in California, citing California cases. *In re Michael C.*, 21 Cal.3d 471, 476 (1978). The court noted Michael's probation officer had instructed Michael to consult with him before waiving his rights so the probation officer could help him. *Ibid.* The court noted that Michael obviously wanted someone he could trust. *Ibid.* The court stated that Michael's probation officer was a personal advisor on whose advice he could rely. *Ibid.* The court characterized the probation officer as a "trusted guardian figure" exercising the *parens patriae* authority of the state. *Ibid.* The court stated that Michael was not asking to confide in a prosecutor, but was asking for help. *Ibid.* The court specifically noted the California statutory requirement that the probation officer act "to represent the minor." *In re Michael C.*, 21 Cal.3d 471, 477 (1978), quoting California Welfare and Institutions Code section 280. The court found that the probation officer in California has "the duty to advise and care for the juvenile defendant." *In re Michael C.*, 21 Cal.3d 471, 477 (1978).

In sum, the California Supreme Court held that a probation officer *in California* (relying exclusively on *California* cases and statutes) has a duty to act on behalf of a minor. The duty to act for the suspect was one of the grounds *Miranda* listed as the reason for having an attorney at the interrogation. The other reason *Miranda* gave for having an attorney was to

dispel fear at the interrogation. Again, the California Supreme Court has held that *in California* a request for a probation officer by a minor is a "call for help," a request for assistance in dealing with the police. *In re Michael C.*, 21 Cal.3d 471, 476 (1978). Thus, this kind of assistance would dispel the fear involved in the interrogation process.

A state court decision construing *state* statutory law is binding on this court as to that consideration. *Uphaus v. Wyman*, 364 U.S. 388, 389 (1960). The California Supreme Court has relied here on state statutes and California cases construing those statutes in concluding that a minor's request for a probation officer in California is a request for help from a person having a duty to act on behalf of the minor. Since that construction is binding on this court, and since the roles described by the California Supreme Court apply completely to the reason stated in *Miranda* for having an attorney at the police interrogation, Michael's request for his probation officer *amounts* to a request for an attorney in California, and thus bars further interrogation.

Any other conclusion would require that a minor formally request an attorney before interrogation must cease. This approach simply ignores the reality stated by the California Supreme Court: that a juvenile will not be in the position of being able to call an attorney for help, and it is unrealistic to attribute no significance to a call for help to a parent or guardian. *In re Michael C.*, 21 Cal.3d, 471, 475-476 (1978); *People v. Burton*, 6 Cal.3d 375, 382 (1971). This court has repeatedly held that "special" considerations must be given confessions made by juveniles to insure their voluntariness. See, e.g., *In re Gault*, 387 U.S. 1, 55 (1967); *Gallegos v.*

Colorado. 370 U.S. 49, 54 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948). Those statements are meaningless unless recognition is given to the realities of being a young person, with the immaturity and inexperience that accompany youth. It is not an "extension" of *Miranda* to hold that a minor's request for his probation officer amounts to a request for counsel; it is the *only* way to recognize under *Miranda* the "special" consideration required for juvenile confessions.

Under the "logic" of *Miranda*, a request for help to dispel fear by asking for someone with a duty to help the minor qualifies as much as an invocation of the right to counsel as an adult asking for an attorney to accomplish those same things. It would be truly ironic to require a youngster of tender years to invoke his or her rights by exclusively using the words or means an adult would use, when the "differences" between adults and juveniles are repeatedly used to *deny* minors certain rights every adult is entitled to—e.g., a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

Inasmuch as the courts have recognized huge differences between adults and juveniles, it would be illogical to hold that minors can assert their rights under *Miranda* only by using adult formulations.

Petitioner relies on the dissent of *Miranda* to support the argument that counsel was recognized by the court because of the Sixth Amendment. Brief for the Petitioner, at 14-16. In fact, the majority opinion, as discussed above, did not rely on the Sixth Amendment or focus on the legal aspects of being an attorney to justify reliance on counsel. Instead, the court noted the role of an attorney in dispelling fear, and the duty of counsel to the suspect. In California, as noted, probation officers have a similar duty to minors.

Amicus curiae agrees that a request by Michael for an attorney would have invoked the Fifth Amendment, but urges that only a request for counsel would suffice, arguing that attorneys are best qualified to advise suspects of their legal rights. Brief Amici Curiae, at 13-14. Amicus misses the point: the role of the attorney is not to advise a suspect of his or her rights; that is the role of the police. As has been explained, the attorney's role is to dispel fear and act on behalf of the suspect. In California, probation officers perform those functions.

Petitioner then argues that probation officers cannot act on behalf of minors because probation officers are an arm of the prosecution. Brief for the Petition, at 17. Petitioner is wrong. The very case cited by petitioner expressly provides that the probation officer in California is an arm *of the juvenile court*, not the prosecution. *In re Steven C.*, 9 Cal.App.3d 255, 265 (1970). The probation officer has been called the juvenile court's "special officer." *In re Dennis H.*, 19 Cal.App.3d 350, 355, fn. 7 (1971). Petitioner correctly observes that probation officers in California are peace officers, but fails to state what powers are included in that designation. In fact, California Penal Code section 830.5, subdivision (a) makes probation officers peace officers but sharply limits their powers, basically providing that their powers extends only to conditions of probation. And California Welfare and Institutions Code section 283 makes juvenile probation officers peace officers but gives them only the powers provided in California Penal Code section 830.5, subdivision (a).

The probation officer did file this petition, on Michael's behalf, not against him. *In re Steven C.*, 9 Cal.App.3d 255, 264-265 (1970). Moreover, as a result of a subsequent statutory amendment, probation

officers no longer file juvenile petitions in California, further retracting their "prosecutorial" powers.[4] Lastly petitioner relies on the concurring opinion in the California Supreme Court to claim that the probation officer has to advise the minor to cooperate with the police, even to the extent of implicating himself in a serious felony. Brief for the Petitioner, at 17. But the *majority* opinion of the court held that the probation officer is *not* a prosecutor, and in fact has a duty to act *on behalf* of the minor. *In re Michael C.*, 21 Cal.3d 471, 476-477.

Amicus similarly argues that since the probation officer is a peace officer, asking for a probation officer is like asking for a police detective. Brief Amici Curiae, at 14-15. Not only does this suggestion overly simplify the significance of the words "peace officer," as used in California, but it too ignores that the majority opinion of the California Supreme Court expressly concluded Michael was not asking for a prosecutor, but was

[4]The precedent value of this court's decision in this case will be of limited significance, even in California. Whatever this court might hold as to the significance of a request for a probation officer by a minor on the facts in this case will simply be inapplicable to current law. A central focus of petitioner as been the peace officer status of the probation officer in California, including the role of the probation officer in filing the petition as to the minor. Probation officers did file petitions as of the time this case arose.

However, probation officers no longer file petitions in juvenile cases involving delinquency. California Welfare and Institutions Code section 650, which formerly provided that probation officers were to file delinquency petitions, was amended, effective January 1, 1977. Both the old and the amended sections can be found in the Brief for the Petitioner, at 6, 7. The new statute provides that the District Attorney is to file delinquency petitions instead of the probation department. Thus, the role of the probation officer has itself been changed since the commencement of this case. Any holding as to the effect of Michael asking for his probation officer back in 1976 under the old statute is merely dicta as to such a request today under the new statute.

asking for help from one duty bound to act on his behalf. *In re Michael C., supra.*

Petitioner then states that probation officers are not attorneys in any state, and that probation officers in almost every state in the union have peace officer powers or their equivalent. Even if petitioner was right, the wide variety of powers exercised by probation officers in these United States would itself suggest that roles of probation officers are so different as to preclude any simple, flat rule governing the effect of a request for a probation officer. But, again, petitioner is wrong.[5]

Seven states do expressly provide that juvenile probation officers are peace officers, with no limitations on such powers.[6]

[5]Frankly, it is somewhat amazing that the claims of petitioner as to the powers of probation officers in each state are so different from the actual powers authorized by law. Where discrepancies appear (and that is often), the correct statute and statement of powers is included, with petitioner's claims noted.

Petitioner's listing of statutes and powers is found at Brief for the Petitioner, at 17-19, fns. 4-9.

[6]Michigan: Mich. Stat. Ann., §27.3178 (598.14) (though petitioner lists Michigan as only providing limited authority to take a juvenile into custody. See also Mich. Stat. Ann. §27.3178 (598.10), providing that probation officers in Michigan can sit as referees); Nevada: Nev. Rev. Stat. §§62.120, 62.122; New Hampshire: N.H. Rev. Stat. Ann. §169: 6 (not N.H. Rev. Stat. §504: 4, listed by petitioner, which clearly applies to adults only); New York: N.Y. Crim. Proc. Law §1.20.33 (5) (but cf. *People v. Ronald W. (Anonymous),* 24 N.Y.2d 732, 735 (1968), holding that a probation officer need not give the *Miranda* advisement because a probation officer is not a "law enforcement officer" under *Miranda*); Ohio: Ohio Rev. Code Ann. §2151.14; Virginia: Va. Code §16.1-237; and Washington: Wash. Rev. Code Ann. §13.04.040 (the last three states—Ohio, Virginia, and Washington, are listed by petitioner as only giving probation officers the power to arrest, not as authorizing complete peace officer powers).

Fourteen jurisdictions give juvenile probation officers peace officer authority "in the performance of their duties." But the list of duties, and consequently the power derived therefrom, varies considerably among those states.[7]

Six states give juvenile probation officers the power to arrest only for violations of probation.[8]

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[7]Arizona: Ariz. Rev. Stat. §8-205; Colorado: Colo. Rev. Stat. §19-5-102; Connecticut: Conn. Gen. Stat. Ann. §17-58; District of Columbia: D.C. Code Encycl. §11-1524; Hawaii: Haw. Rev. Stat. §571-85; Iowa: Iowa Code Ann. §231.10 (this statute states that juvenile probation officers appear in court to represent the "interests of the child."); Kentucky: Ky. Rev. Stat. §208.320 (the above seven jurisdictions are listed by petitioner as giving full peace officer powers to probation officers); Louisiana: La. Rev. Stat. Ann. §13: 1587 (listed by petitioner as giving on the power to arrest to probation officers); Massachusetts: Mass. Gen. Laws Ann. ch. 276 §90; Minnesota: Minn. Stat. Ann. §260.311; Missouri: Mo. Ann. Stat. §211.401; South Carolina: S.C. Code §24-21-280 (listed as S.C. Code §15-1377 by petitioner); South Dakota: S.D. Compiled Laws Ann. §26-7-9; Texas: Texas Ann. Civ. Stat. art. 5142 (the above six states are listed by petitioner as giving full peace officer powers to probation officers).

[8]California: Cal. Welf. & Inst. Code §283, Cal. Penal Code §830.5 (1) (listed by petitioner as providing full peace officer powers; actually such authority applies only to "conditions of probation").

Florida: Fla. Stat. Ann. §390.03; Montana: Mont. Rev. Codes Ann. §10-1234 (5), (Mont. Rev. Codes Ann. §10-1234 (1) provides that no law enforcement officer can be a probation officer); Nebraska: Neb. Rev. Stat. §§29-2255, 29-2266 (petitioner cites Neb. Rev. Stat. §§29-2216, 29-2258, which apply to adult probation officers only; petitioner lists Nebraska as giving probation officers the authority to arrest, without noting that this only applies to violations of probation); New Mexico: N.M. Stat. Ann. §13-14-9 (not N.M. Stat. Ann. §13-14-8, as listed by petitioner), and Utah: Utah Code Ann. §78-3a-29 (listed by petitioner as authorizing arrests; actually, it authorizes only arrests for violations of probation, or in an emergency where no peace officer is available; otherwise probation officer arrest powers are expressly the same as those or private citizens, presumably including attorneys).

Seven jurisdictions give probation officers the power to arrest only those minors who already are wards of the court.[9]

Four states allow juvenile probation officers to arrest wards of the juvenile court, but only with the approval of the juvenile court.[10]

In three states, the status of juvenile probation officers is unclear.[11]

Seven states simply do not list any peace officer

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[9]Georgia: Ga. Code Ann. §24A-602 (but cf. *Huff v. Walker*, 187 S.E.2d 343, 125 Ga.App. 251, 252 (1972) holding that a juvenile probation officer cannot apply for a search warrant, because such application can only be made by an officer of the state "charged with the duty of enforcing criminal laws."); Idaho: Idaho Code §16-1820 (listed by petitioner as giving full peace officer powers; the section also states that the probation officer "shall be a friend of the child at all times."); Maine: 34 Me. Rev. Stat. §1682; Oklahoma: 10 Okla. Stat. Ann. §1205(a); Oregon: Or. Rev. Stat. §419.610 (listed by petitioner as giving full peace officers powers); Rhode Island: R.I. Gen. Laws §14-1-33; United States of America: 18 U.S.C.A. §3653.

[10]Alabama: 13 Ala. Code §105 (providing that probation officers are not law enforcement officers where probation is not involved; petitioner lists the statute as Ala. Code §12-15-7); North Dakota: N.D. Cent. Code §27-20-06 (specifically providing that the probation officer is *not* a law enforcement officer); Pennsylvania: 11 Pa. Stat. Ann. §50-201; Tennessee: Tenn. Code Ann. §37-206 (also specifically providing that the probation officer is *not* a law enforcement officer).

[11]Alaska: Alaska Stat. §§47.10.142, 47.10.140, and 33.05.070 (probation officers can arrest probationers, but no reference to juvenile probation officers); New Jersey: N.J. Stat. Ann. §§2A: 4-11, 2A: 4-31, and 2A: 4-32 (N.J. Stat. Ann. §2A: 168-4, cited by petitioner, clearly applies only to adults; N.J. Stat. Ann. §2A: 4-12 authorizes probation officers in juvenile cases to sit as referees); Wisconsin: Wis. Stat. Ann. §§54.15, 54.03, (apparently applying only to persons over 17), 48.12 and 48.28.

powers or functions as to juvenile probation officers.[12]

And finally, four states expressly provide that juvenile probation officers are *not* peace officers.[13]

In sum, the variety of the status and powers of juvenile probations officers throughout the United States is extremely wide, ranging from full peace officers to limited arrest powers, to powers over wards on probation, or to no peace officer powers at all. It is

[12]Arkansas: Ark. Stat. Ann. §45-415; Delaware: 10 Del. Code §911 (making probation officers "conservators of the peace," a reference defined to include judges in the Delaware Constitution, art. XV, §1; petitioner lists Del. Code tit. 11, §4321 as giving full peace officer status, which it does, but only to *adult* probation officers); Illinois: Ill. Ann. Stat., ch. 37, §706-1, (Ill. Ann. Stat., ch. 38, §204-3, cited by petitioner, clearly applies only to adult probation officers); Kansas: Kan. Stat. Ann. §38-814 (authorizes probation officers to take a minor into custody only for the court to make a disposition order); Maryland: Md. Ann. Code, Cts. and Jud. Procd. §3-814 (contrary to petitioner's claim that this section provides probation officers with limited authority to take a minor into custody, the section merely states that only a law enforcement officer or other person authorized by the juvenile court may arrest a minor, making no reference to probation officers at all); Mississippi: Miss. Code Ann. §§43-21-43 and 43-23-43 (contrary to petitioner's claim that these sections only allow an arrest where the court requests it, neither provision refers to peace officers at all); and North Carolina: N.C. Gen. Stat. §110-23 (contrary to petitioner's claim, this section makes reference only to supervision of probationers and says nothing whatever about probation officers having full peace officer powers).

[13]Indiana: Ind. Code Ann. §31-6-9-4 (c) (5) (providing for supervision only, stating probation officers are *not* law enforcement officers; Ind. Code Ann. §31-5-7-12, cited by petitioner, merely states that probation officers are not forbidden to arrest; Ind. Code Ann. §33-12-2-22, cited by petitioner, has been repealed); Vermont: 33 Vt. Stat. Ann. §638 (Vt. Stat. Ann. tit. 28, §301, cited by petitioner, does give the powers to arrest to probation officers for violations of probation, but appears to refer to adults only); West Virginia: W. Va. Code §49-5-15(a); Wyoming: Wyo. Stat. §5-3-504 (petitioner lists Wyo. Stat. §7-31 as giving the power to arrest; no such section exists).

simply impossible to formulate a rule as to the effect of a request by a minor for a probation officer which could reasonably govern all these disparate rules. In two states, such a request could also be a request for the juvenile court referee.[14]

Petitioner attempts to answer the characterization by the California Supreme Court of Michael's request for his probation officer as a request for a personal advisor on whose advice he could rely (21 Cal.3d at 476) by arguing that the record in this case "does not establish respondent's fear of the police, ignorance of the law or trust in his probation officer, . . . " Brief for the Petitioner, at 16.

One wonders how much of a record is required to show Michael feared the police. Before any waiver of rights, Michael was told he could have an attorney but not his probation officer. Michael responded by asking, "How I know you guys won't pull no police officer in and tell me he's an attorney?" A, at 55. Michael then repeated this question, clearly showing his lack of trust in the police, a fear borne out by the officer's candid admission, "Well, we don't always play fair, do we?" A, at 56. Later, Michael stated "I don't know what you got (Unintelligible) . . . search warrant to kick in my front door (Unintelligible) . . . ," to which the officer responded, "We'll get by that—" A, at 64. Lastly, the officer informed Michael, "Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled. (sic.)" Michael replied, "They say that to just get you to cop out and then they'll back whatever you

[14]Michigan (Mich. Stat. Ann. §27.3178 (598.10) and New Jersey (N.J. Stat. Ann. §2A: 4-12).

want to call it. They'll fuck you (Unintelligible) . . . just to hear you talking . . ." A, at 65. All this happened prior to Michael making any confession in this case. Next there is a "Pause in recording," (A, at 66), characterized by defense counsel and the juvenile court as "crying." A, at 53. Then Michael confessed.

Thus, the facts clearly show a frightened youngster who was terrified of the police and feared he would be tricked.

Contrary to petitioner's claim that the record shows neither Michael's ignorance of the law or his trust in his probation officer, Michael's request for his probation officer demonstrates both these things. After all, Michael feared the police would trick him by bringing in a police officer and telling him that person was an attorney. Michael clearly wanted someone he knew and could trust, not any unknown quantity. And he must have wanted that trusted person to help him since the request for his probation officer was made directly in response to the inquiry whether Michael waived his right to counsel. A, at 55.

Petitioner further argues that the subjective intent of a suspect asking for a probation officer "cannot be predicated with sufficient certainty to justify the per se rule" set out by the California Supreme Court in view of the wide variety of powers conferred upon juvenile probation officers. Brief for the Petitioner, at 19. This very diversity of roles of probation officers toward minors throughout the country bars any "per se" rule that a request for a juvenile probation officer *not* invoke *Miranda*. And the California Supreme Court, as noted above, has discussed the role of the probation officer in California, along with a discussion of the record of this case, and concluded that *Michael* was

invoking his rights. The court did not purport to make any general rule, but merely held that "the minor" "here" invoked *Miranda* by asking for "his" probation officer. *In re Michael C.*, 21 Cal.3d 471, 476 (1978).

Petitioner next complains that the police and other trial courts are left to speculate as to whether requests for a coach, clergyman, or other person, are requests which invoke *Miranda*. Brief for the Petitioner, at 23. This is not true. The California Supreme Court expressly answered this claim, holding that such requests are "entirely distinguishable," citing the unique role of the probation officer *in California*. *In re Michael C.*, 21 Cal.3d 471, 477 (1978).[15]

Petitioner also complains that if states are allowed to add to the list of persons who when requested invoke *Miranda*, precise rules for law enforcement will be lost. Brief for the Petitioner, at 27. But the rules are clear: a request for help by a suspect invokes *Miranda*, where the roles described in *Miranda* are fulfilled. As to a juvenile in California, a request for his probation officer is a request for advice from someone whose duty is to the minor, and such a call for help to dispel fear of the custodial interrogation bars further interrogation. Such a rule is clear and specific. Of course, states are free to expand upon *Miranda* anyway, relying on their own Constitutions.

Amicus argues that the holding of the California Supreme Court inevitably means that a request to

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[15]Under the *Miranda* test that the right to silence is exercised by indicating in any manner a lack of willingness to talk, a request for someone else should invoke *Miranda*. Even a request to see another police detective shows lack of willingness to talk with the police officer seeking a waiver.

speak to "anyone" would invoke *Miranda*. Brief Amici Curiae, at 15. This concern was fully answered by the California Supreme Court in delineating certain features of the probation officer's role in California which made Michael's request for his probation officer tantamount to a request for counsel. These features clearly would not apply to "anyone".[16]

Petitioner argues that inquiries into whether a suspect wishes to talk with a probation officer, parent, etc. "do not reach the fundamental point of *Miranda* which is that interrogation should not be undertaken by the police unless that suspect is informed of his rights and indicates a willingness to speak." Brief for the Petitioner, at 19. This misconceives the nature of *Miranda*, which was to dispel the inherently coercive nature of police custodial interrogation by requiring an advisement and waiver of both the right to silence and to an attorney. Determining whether one of those rights is being asserted is essential to insuring the voluntariness of statements by suspects.[17]

[16]Amicus also argues that persons other than attorneys might not be able to properly advise a minor. This is why a request for anyone was not held by the California Supreme Court to invoke *Miranda*. Amicus cites *M.D.G. v. State*, Okla. Ct. Crim. App., 24 Cr. L. 2079 (9/26/78), where the court held that a father's waiver of *Miranda* was insufficient to allow the minor's confession into evidence. Brief Amici Curiae, at 14. All that case held as that a *personal* waiver of rights is required; no one—parent, attorney, or probation officer—can waive someone else's rights.

[17]Petitioner devotes considerable space to a discussion of whether an adult advisor must be present before a juvenile can waive *Miranda*. Brief for the Petitioner, at 28-32. While this is a very interesting issue, it is wholly inapplicable to this case. Respondent has never at any point in either the California or federal courts claimed that Michael's confession was inadmissible because no adult advisor was present. The point has never been raised by either side or any court, and has never been briefed until now. It was not included in the petition for writ of certiorari. It certainly cannot be raised for the first time, by petitioner, at this late date.

II

MICHAEL'S REQUEST FOR HIS PROBATION OFFICER WAS WITHIN THE "EXPRESS TERMS AND LOGIC" OF *MIRANDA*

Prior to this court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the determination as to whether a confession was admissible in a criminal proceeding was the "totality of circumstances" test: whether all the circumstances considered together showed that the statement was involuntary or not. See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 738 (1968).

In *Miranda* this court discussed interrogations conducted by police of suspects in custody. The *Miranda* court recognized that such custodial interrogations were inherently coercive, and statements obtained therefrom were involuntary. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966). *Miranda* provided a mechanism to allow police to conduct custodial interrogations in such a manner as to dispel the inherent coerciveness surrounding them, by requiring the police to advise suspects of their rights to remain silent and to counsel *prior* to the commencement of the interrogation. The court concluded that the request of a suspect to remain silent, or for his attorney, would show that suspect's intention not to make a voluntary statement, rendering any statement obtained therafter involuntary as a matter of law. *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966).

The *Miranda* decision was a recognition that a person undergoing custodial interrogation at the hands of the police needs the protection of an advisement of

rights and the opportunity to be told of the right to have someone advise him to assist in the exercise of those rights.

In effect, *Miranda* reasoned that a person in police custody confessing during interrogation by law enforcement is not making a free and voluntary statement, but rather is simply submitting to authority, unless an advisement of rights is given to dispel the coerciveness inherent in the situation. In contrast to *Miranda*, this court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1972) held that an advisement of rights is not required prior to the giving of a consent to search. The court noted the *Miranda* discussion of the inherent coerciveness of custodial interrogation, but distinguished that from the request for consent. The court noted that in *Miranda* the suspect was in police custody, while a consent to search is often requested at the suspect's own property where coerciveness ordinarily would be absent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1972) Thus *Schneckloth* essentially reinforces the *Miranda* court's observations concerning the submission to authority involved in custodial, as opposed to noncustodial, interrogation.

Miranda has never been overruled. Nor does petitioner ask that *Miranda* be overruled in the Questions Presented. *Miranda* has been limited in its application, and certainly not expanded. But the core of *Miranda* remains: custodial interrogation is inherently coercive, and can only result in a voluntary relinquishment of rights where those rights are expressly stated to the suspect and expressly waived by the suspect.

A. Michael Did Clearly Invoke the Fifth Amendment Prior To Confessing

Petitioner questions the standard used by the California Supreme Court: that anything done by the suspect which "reasonably appears inconsistent" with a present willingness on the part of the suspect to discuss the case freely and completely with the police at that time amounts to an invocation of the Fifth Amendment of the United States Constitution, and renders any subsequent statement involuntary as a matter of law. Brief for the Petitioner, at 20. Petitioner argues that where an ambiguous answer is given, the police should be allowed to question further to "clarify" the intention of the suspect as to whether an assertion of rights is really meant. Brief for the Petitioner, at 20. However, the California Supreme Court is simply restating the express terms of *Miranda*, that if a suspect *in any manner* indicates a wish to remain silent, further questioning is barred. This is simply a recognition of the inherent coerciveness of custodial interrogation. Any answer can be construed as "ambiguous," since even "I don't want to talk" could be merely a request for a few minutes time before making a statement. This approach inevitably requires *Miranda* be expressly overruled, custodial interrogation be discarded as a relevant consideration, and only the totality of circumstances test be used.

Petitioner simply ignores the reality described in *Miranda* of the submission to authority inherent in custodial police questioning. If even an assertion of the right to remain silent or a request for an attorney allows further questioning to "clarify" the intent of the suspect, the inherent coerciveness of custodial inter-

rogation will cause the suspect to submit to authority and make a statement, clearly involuntarily.

Petitioner "illustrates" this point by claiming that Michael made an ambiguous request in this case by asking for his probation officer, and that further questioning by the police "clarified" Michael's intent by obtaining an unequivocal waiver afterwards. Brief for the Petitioner, at 23. On the contrary, this case illustrates the involuntariness of Michael's statement, and the inherent coerciveness of allowing the police to continue to question a suspect after an assertion of rights. Michael did more than merely ask for his probation officer, have his rights re-explained, then unequivocally waive them. Michael asked for his probation officer, and was told he could not have his probation officer but could have an attorney. Michael then asked the police how he could know the police would not bring in a police officer and tell Michael he was attorney. Michael repeated this statement, which is never responded to by the police. A, at 55. This is hardly illustrative of an ambiguous answer properly clarified by the police to show that no assertion of rights was intended. Michael's comments clearly show his lack of trust in the police, and his suspicion that they would trick him. (A suspicion certainly enhanced by the police comment, moments later, "Well, we don't always play fair, do we?" A, at 56.) The record is thus absolutely clear that Michael was not willing to discuss the case completely and freely with the police; he felt they might trick him, and he asked for someone he knew to avoid that from happening.

Ignoring that reality requires the overruling of *Miranda*, which precisely recognized this possibility, and thus mandated both the advisement and the

unequivocal waiver not present here. That Michael eventually said the words, "Yeah, I want to talk to you," (A, at 55) does not demonstrate the voluntariness of the statement in light of the exchange preceding it, any more than such a statement would show voluntariness after torture. Michael showed his reluctance and fear of the police at the outset; his later statements were thus clearly involuntary and merely a submission to the continued pressure of the custodial interrogations in this case.

Petitioner also argues that the *Miranda* advisements have been "noted" by this court as "not necessarily indispensable to the Fifth Amendment privilege against self-incrimination." Brief for the Petitioner, at 25, fn. 11. Petitioner cites two cases for this astounding assertion, *Brown v. Illinois*, 422 U.S. 590, 600 (1975), and *Michigan v. Payne*, 412 U.S. 47, 53 (1973). Brief for the Petitioner, at 25, fn. 11.

Both cited cases state that the *Miranda* advisements are "prophylactic." But *Brown v. Illinois*, *supra*, held that the *Miranda* advisements did not automatically and of themselves break the chain of illegality following an illegal arrest. And *Michigan v. Payne*, *supra*, held that *North Carolina v. Pearce*, 398 U.S. 711, (1969) was not retroactive in its application. These cases hardly support the claim that the *Miranda* advisements are "not necessarily indispensable" to the Fifth Amendment. Of course, no case has ever overruled the holding of *Miranda*, that an advisement and waiver of rights is required for a confession resulting from custodial interrogation to be deemed voluntary.

B. Miranda's "Inflexibility" Insures Truly Voluntary Confessions

Amicus Curiae for petitioner complains that the problem with *Miranda* is its "inflexibility." Brief Amici Curiae, at 6. Of course, the requirement that only voluntary confessions are admissible is an "inflexible" rule. It does not allow the flexibility to allow involuntary, but true, statements into evidence. This approach would return us to confessions obtained by torture.

Miranda recognized that the only way to dissipate the inherent coerciveness of custodial interrogation so as to avoid involuntary statements was to require an advisement and waiver of rights. That firm, "inflexible" rule provides that only stable, guaranteed mechanism to insure that confessions are not merely the result of the coercion resulting from interrogations conducted by police with a suspect in custody. Nothing short of requiring an advisement and waiver will suffice to rectify the coerciveness that otherwise results from custodial police interrogations.

Amicus urges that the inflexibility of *Miranda* is demonstrated by this case, listing several reasons. Brief Amici Curiae, at 16. Amicus first claims that there was no coercion by the police. In fact, there was coercion, see III below. But apart from that, the inherent coercion of the custodial interrogation is shown by Michael's request for his probation officer, followed by his request for his probation officer, followed by his question as to how he could be sure that police would not trick him. A, at 55. Michael's "agreement" to make a statement after the initial exchange shows that he was not voluntarily making the statement, but rather was

submitting to the coercion of the interrogation itself.

Second, Amicus observes that the "suspect stated expressly that he was willing to talk to the police." Brief Amici Curiae, at 16. It is true Michael at one point said those words. See A, at 55. Of course, when he was first asked to talk, Michael said "Yeah, I might talk to you," hardly an unequivocal consent. A, at 55. Moreover, Michael's request for his probation officer, and his fear that the police would trick a statement out of him, all of which preceded the express statement of willingness to talk (A, at 55), further reflect Michael's failure to unequivocally express a willingness to talk with the police.[18]

Third, Amicus states that "the suspect confessed, voluntarily, to a serious crime: murder;" Brief Amici Curiae, at 16. Of course, the voluntariness of the statement is precisely in issue in this case. Further, in III below, respondent argues the involuntariness of the statements, even under the old totality of circumstances test. Amicus fails to explain the significance of the fact that the crime was "serious." Logically, the more serious the case, with the more serious potential for confinement as a result, the more important it is to insure that a suspect is protected from coercion, and that truth is ascertained.

Fourth, Amicus states that the minor was "convicted" by the trial court and that "conviction" was affirmed

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[18] Michael's "express statement of willingness to talk with the police, made once, stands in stark contrast both to the above dialogue prior to that "agreement" to talk, and to the three separate occasions after the statement he would talk to the police, prior to making any admission, when Michael was asked by the police to tell them what happened, and he said "No." (See III, below.) A more unambiguous assertion of the right to remain silent is hard to imagine.

by an unanimous California court of appeal. Brief Amici Curiae, at 16. Of course, the only "evidence" of the minor's involvement was the confession here at issue. In addition, upon petition for rehearing, one of the justices in the court of appeal voted to grant a rehearing as to the affirmance of appeal. Lastly, once the California Supreme Court granted a hearing in this case, the court of appeal opinion was vacated, became a nullity, and thus cannot now be used for any purpose. Rule 976 (d), Cal. Rules of Ct.; *People v. Rogers*, 21 Cal.3d 542, 547 (1978); *Ponce v. Marr*, 47 Cal.2d 159, 161 (1956).

Fifth, and last, Amicus argues that "there is nothing in the record on appeal which casts the slightest doubt on Michael C's factual guilt." Brief Amici Curiae, at 16. This is ironic in light of the admission by Amicus that without the confession the evidence is insufficient to sustain a conviction on appeal. Brief Amici Curiae, at 17, and fn. 12. And clearly the issue at this point of the case is not whether Michael is or is not guilty, factual issues not being cognizable on appeal, but rather whether the confession which is the only "evidence" of Michael's "guilt" is involuntary and thus inadmissible.

What any of the above "factors" have to do with "flexibility" is unclear. As noted above, a fixed rule is necessary to insure truly voluntary confessions. Ironically, the very criticism made by Amicus, that the *Miranda* rule is inflexible, is the very point made by Justice Rehnquist in the stay order in this case as the main value of *Miranda* according to its supporters: its clarity and certainty. *Fare v. Michael C.*, 99 S. Ct. 3, 5 (1978).

In sum, a fixed rule is required to insure that there is adequate protection against the inherent coerciveness

of custodial interrogation. That is the main benefit of *Miranda*.

C. Miranda Does Not Allow Guilty Persons To Be Set Free on Technicalities

Petitioner warns of "The most heinous of crimes" that may go unprosecuted because of a "technical" violation of *Miranda*. Brief for the Petitioner, at 12. Of course, if there is proof of guilt apart from the confession, the prosecution is free to present it to secure a conviction. If the *only* evidence of guilt is a confession, special concern must be given to insure that the confession is true. That is precisely why torture and extortion are not allowed to obtain statements. Involuntary statements are not sufficiently reliable to support a conviction where only the accused's confession points to guilt. Logic dictates that a statement obtained only because of a suspect's submission to authority fits into the same category. That is why *Miranda* sets up protections to insure that statements are obtained voluntarily, and not just as a result of the coercion of custodial interrogation.

Petitioner asserts that all *Miranda* intended to bar was confessions that were compelled, where the suspect's free will was overborne. From this, Petitioner concludes that where *Miranda* advisements are given, the totality of circumstances test should be used as the only measure of voluntariness. Brief for the Petitioner, at 26-27. This approach would require that the very core of *Miranda* be discarded. *Miranda* used the warnings therein discussed as only the initial step; the second, and critical step, was the *waiver* of rights. As discussed above, both the right to silence and the right

to counsel must be expressly waived, and *any* indication of lack of willingness to talk invokes the right to remain silent. Petitioner's approach of requiring only certain words be spoken by the police, with an assertion of rights being limited to the speaking of certain words by the suspect in response, would transform concern *Miranda* expressed as to the coerciveness of custodial interrogation into a mere ritual to be performed without content.[19]

This, above all, is what *Miranda* stands for: the police must inform a suspect in custody of his rights, and can interrogate the suspect only if he knowingly and intelligently gives up those rights. Content is everything; the advisement required by *Miranda* was simply an attempt to insure an understanding of the rights by suspects. *Miranda* does bar use of compelled confessions, and recognizes that custodial interrogation compels confessions. Petitioner never denies this. Nor does petitioner suggest any method other than the *Miranda* advisements to dissipate that compulsion.

Amicus complains of confessions suppressed "which were by any reasonable and objective standard voluntarily made," and suggests that guilty persons go free as a result. Brief Amici Curiae, at 8. Of course, Amicus fails to state which "reasonable and objective" standards were used by Amicus to determine the

[19]Petitioner never states what precise words would have to be spoken by a suspect to invoke the right to remain silent sufficiently to bar further police interrogation. One wonders if "No" to the question, "Do you want to tell us about it?" would suffice. Yet that precise exchange happened in this case, with Michael saying, "No." A, at 56. As noted in III, below, Michael on three occasions prior to the admission of the offense clearly told the police he did not want to talk with them.

"voluntariness" of those confessions. Amicus fails to deal with the *Miranda* court's conclusion that custodial interrogation is inherently coercive, rendering statements obtained as a result thereof, without actions to dissipate that coercion, involuntary.

While Amicus places great stress on freeing "patently guilty" persons as a result of the suppression of confessions due to *Miranda* (again, the same argument could be made to contest suppressing confessions obtained by torture), Amicus lists only six instances as examples. Of those, only two were mentioned as possibly resulting in dismissal on reversal. The claimed restrictions on law enforcement as a result of *Miranda* are hardly shown by listing a grand total of two cases where defendants may have been released for *Miranda* violations. Once again, one wonders how "patently guilty" a person is against whom there is no evidence whatever except a coerced confession.

It is interesting that Amicus chooses to claim that *Miranda* has a "detrimental" effect on law enforcement (Brief Amici Curiae, at 16) yet cites no authority for this proposition apart from the two cases noted above. In fact, many studies have been conducted concerning *Miranda*'s effect upon law enforcement. These studies have consistently shown that *Miranda* has had little if any impact on law enforcement, and has not caused a reduction in convictions or an increase in releasing "patently guilty" defendants.[20]

[20]*See Lederer, Miranda v. Arizona—The Law Today,* 78 Military Law Review 107, at 161 (1978); Witt, *Non-Coercive Interrogations and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality,* 64 J. Crim. L. & Criminology 320 (1973): Leiken, *Police Interrogation in Colorado: The Implementation of Miranda,* 47 Den. L.J. 1 (1970); Nedalie, Zeitz & Alexander, *Custodial Police*

(continued)

It appears that Amicus would establish a rule admitting involuntary confessions in cases with "patently guilty" individuals but barring them otherwise—the key focus being on factual guilt. If there is clear proof of guilt apart from the confession, one wonders why the confession need be admitted at all. And where the only evidence of guilt is a confession, this should hardly qualify as involving "patent guilt," and there is even greater reason to exclude an involuntary confession.

Amicus' request for a narrowing of the required exclusion of confessions in violation of *Miranda* is ironic. Amicus claims that law enforcement is constricted by technical rules unrelated to the voluntariness of statements made during interrogations. Such concern is in contrast to what counsel for Amicus tells law enforcement. Counsel for Amicus has published material for law enforcement advising them that this court has "tacitly" approved the use of "trickery and deceit" in obtaining confessions, even after *Miranda*. Inbau, *Legally Permissible Criminal Interrogation Tactics and Techniques*, 4 Journal of Police Science and Administration 249, at 251 (1976); Inbau and

(footnote continued from preceding page)
Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347 (1968); Seeburger & Wettick, *Miranda In Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Comment, *Interrogation in New Haven: The Impact of Miranda*, 76 Yale L.J. 1641 (1967); Sobel, N., The New Confession Standards (1966), at 140-151; and perhaps the most interesting study, done by the petitioner in this case, Younger, Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding The Effect Of The *Miranda* Decision Upon The Prosecution Of Felony Cases, found at both American Criminal Law Quarterly 32 (1966) and 35 Fordham Law Review 159, 255-262 (1966).

Carrington, Evidence for the Police (1972) at 56.[21] Counsel for Amicus even now tells the police to use trickery and deceit, restrained only by the standard as to whether an innocent person would confess with the use of the particular deception planned by the police; only if an innocent person would confess is the deceit not allowed. *Ibid.* This is the same Amicus asking this court to abandon the strict rule of exclusion of confessions obtained in violation of *Miranda*. One only wonders what Amicus would tell the police was permissible after such an abandonment. Have we become so desperate for confessions at any price that we will encourage the police to go beyond trickery and deceit?[22]

Miranda has not been overruled; it is good law for the proposition that custodial interrogation by police is inherently coercive, and the only way to dispel that compulsion so as to render a resulting statement to be voluntary is to require an advisement and waiver of the rights to remain silent and to have counsel.

[21]Amicus reaches this astonishing conclusion by relying on *Frazier v. Cupp*, 394 U.S. 731 (1968), at 739 where this court held that a confession was not involuntary merely because the police lied to the defendant that an accomplice had confessed. Of course, *Frazier* expressly applied pre-*Miranda* law, *Frazier v. Cupp*, 394 U.S. 731, 739. All *Frazier* held was that, using the old totality of circumstances test, the lie told the defendant did not overcome the myriad factors showing voluntariness in that case.

[22]Use of trickery or deceit by a non-police officer to obtain, say, money, would of course be criminal fraud. See, e.g., California Penal Code Section 484(a).

III

MICHAEL'S STATEMENTS WERE INVOLUNTARY APART FROM THE *MIRANDA* VIOLATION

Both petitioner and Amicus repeatedly claim that there was no coercion in the obtaining of Michael's confession. Petitioner claims that nothing in the California Supreme Court opinion suggests coercion. Brief for the Petitioner, at 28. Amicus simply asserts that there was no coercive activity by the police. Brief Amici Curiae, at 16. This totally ignores the position consistently maintained by respondent that there was coercion in this case. Those contentions have been made in every single brief filed by respondent on the merits in every court proceeding to date. See, e.g., Reasons Why a Writ of Certiorari Should Not Be Granted, 7-10. Of course, a showing of coercion sufficient to establish an involuntary confession apart from the *Miranda* violations noted *ante* would provide an independent ground to support the California Supreme Court's decision. *Walling v. General Industries, Co.*, 330 U.S. 545, 547, fn. 5 (1947). The California Supreme Court did not reject these contentions, the court did not reach them because it disposed of the case on the first ground alleged, the *Miranda* violation.

There are two different indications in the record of involuntariness. Implied threats and promises were used, and Michael clearly showed he did not wish to be interviewed.

First, implied threats and promises were used to obtain the confession. Michael was told by the police during the interrogation, "You got a good chance that you can come out of this thing pretty good." A, at 65. He was then told, "Somebody is going to tell us what happened and the one who tells us what happened is the one that's not going to get hasseled (sic)." *Ibid.* These statements are immediately followed by an exchange of words and a "pause." A, at 66. Michael's conduct during the "pause" was described by defense counsel as "crying," A, at 53, a characterization in which the trial court acquiesced. A, at 53. Michael then "confessed." *Ibid.* It is unmistakably clear in these circumstances that such promises and threats were being employed by the police to obtain a confession. Such misconduct by the authorities renders the statement involuntary as a matter of law, and regardless of the applicability of *Miranda, supra,* compels reversal. *Lynumn v. Illinois,* 372 U.S. 528, 534 (1962).

Second, Michael repeatedly indicated his wish not to be interrogated.

Michael was asked almost at the outset if he wanted to tell the officers about the case. He said, "No, I don't know anything about it." A, at 56. When asked about what another minor had said, Michael answered, "I can't do that." When asked why, Michael said, "Because mama said don't tell strangers nothing." A, at 63. Finally, Michael was asked what happened that night, and he said, "Can't." A, at 64. It is therefore plain that on three distinct occasions, Michael told the police he no longer wished to talk with them.

These assertions of the right to remain silent are in addition to Michael's first answer to the request by the police that he talk with them, "Yeah, I might talk to you." A, at 55. Michael then requested his probation officer. *Ibid.* He further asked the police how he could know that the police would not bring in a police officer and tell Michael he was an attorney, and Michael then repeated that question. *Ibid.*

In sum, Michael repeatedly told the police he did not want to talk with them, and clearly showed his fear and distrust of the police. To characterize this as a confession obtained without coercion is to ignore the plain facts of the record.

This court is required to examine the entire record independently to determine whether a confession is involuntary. *Davis v. North Carolina*, 384 U.S. 737, 741-742 (1966); *Haynes v. Washington*, 373 U.S. 503, 515 (1962). The repeated assertions of the right to remain silent in this case clearly show that the confession thereafter obtained was voluntary, even under the totality of circumstances test.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the opinion and judgment of the California Supreme Court reversing the declaration of wardship be affirmed.

Respectfully submitted,

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FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

KENNETH F. FARE,
Acting Chief Probation Officer,

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v.

MICHAEL C.,

Respondent.

PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

Pursuant to Rule 41(3) of the Rules of the Supreme Court, petitioner submits the following argument in reply to the contentions and argument contained in the Brief for the Respondent.

ADDITIONAL STATUTES INVOLVED:

California Evidence Code, Section 1031:

"As used in this article, 'penitent' means a person who has made a penitential communication to a clergyman."

California Evidence Code, Section 1033:

"Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege."

California Welfare and Institutions Code, Section 627.5:

"In any case where a minor is taken before a probation officer pursuant to the provisions of Section 626 and it is alleged that such minor is a person described in Section 601 or 602, the probation officer shall immediately advise the minor and his parent or guardian that anything the minor says can be used against him and shall advise them of the minor's constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. If the minor or his parent or guardian requests counsel, the probation officer shall notify the judge of the juvenile court of such request and counsel for the minor shall be appointed pursuant to Section 634."

California Welfare and Institutions Code, Section 652:

"Whenever the probation officer has cause to believe that there was or is within the county, or residing therein, a person within the provisions

of Section 601 or 602, the probation officer shall immediately make such investigation as he deems necessary to determine whether proceedings in the juvenile court should be commenced."

California Welfare and Institutions Code, Section 653:

"Whenever any person applies to the probation officer to commence proceedings in the juvenile court, such application shall be in the form of an affidavit alleging that there was or is within the county, or residing therein, a minor within the provisions of Section 300, 601, or 602, or that a minor committed an offense described in Section 602 within the county, and setting forth facts in support thereof. The probation officer shall immediately make such investigation as he deems necessary to determine whether proceedings in the juvenile court should be commenced. If the probation officer determines that proceedings pursuant to Section 650 should be commenced to declare a person described in Section 602 to be a ward of the juvenile court, the probation officer shall cause the affidavit to be taken to the prosecuting attorney. The prosecuting attorney shall within his discretionary power institute proceedings in accordance with his role as public prosecutor pursuant to subdivision (b) of Section 650 of this code and Section 26500 of the Government Code.

"If the probation officer does not take action under Section 654 and does not file a petition in juvenile court within 21 court days after such application, or in the case of an affidavit alleging that a minor committed an offense described in

Section 602 or alleging that a minor is within Section 602, does not cause the affidavit to be taken to the prosecuting attorney within 21 court days after such application, he shall endorse upon the affidavit of applicant his decision not to proceed further and his reasons therefor and shall immediately notify the applicant of the action taken or the decision rendered by him under this section. The probation officer shall retain the affidavit and his endorsement thereon for a period of 30 days after such notice to applicant."

ARGUMENT

I.

RESPONDENT MINOR'S REQUEST FOR HIS PROBATION OFFICER WAS NOT THE EQUIVALENT UNDER *MIRANDA* OF AN ADULT'S REQUEST FOR AN ATTORNEY.

The right against compulsory self-incrimination is designed to protect only against involuntary confessions. Petitioner asserts, therefore, that when interrogating officers are faced with an ambiguous response to a *Miranda* advisement, they should be permitted to clarify the statement in order to determine whether in fact the suspect is expressing an unwillingness to speak and a desire to invoke his privilege against self-incrimination. Respondent minor in the instant case was fully advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 443. (A, pp. 54-55.) Moreover, he nowhere asserts that he was unable to understand the rights as they were explained to him. The issue before this Court is therefore whether or not respondent invoked his right to remain silent during the course of his interrogation.

Respondent claims, and the California Supreme Court ruled, that a minor's request for his probation officer constitutes per se an invocation of the right to silence under *Miranda v. Arizona, supra.* (*In re Michael C.* (1978) 21 Cal.3d 471 [146 Cal. Rptr. 358, 579 P.2d 7]; Petn. for Cert., App. A.; Br. for Resp., pp. 5-6.) At the same time, it is claimed that the ruling is not an extension of *Miranda* because the probation officer is for a juvenile the equivalent of an attorney for an adult. Moreover, respondent and the California Supreme Court assert that a request for a probation officer by a minor is distinguishable from a request for a clergyman, football coach, or other responsible person and that a consistent rule could be formulated under which only a request for the former would constitute an invocation of the right to silence. (*In re Michael C., supra* at p. 477; Br. for Resp., p. 17.) Petitioner submits that the rule adopted by the California Supreme Court below, that probation officers are the equivalent of attorneys for *Miranda* purposes, is a clearly improper extension of the rule adopted by this Court in *Miranda v. Arizona, supra,* and further that probation officers cannot be distinguished from clergymen, football coaches, or other responsible adults, in the context of the *Miranda* rules.

Petitioner submits that the analogy between probation officers and attorneys has been improperly drawn by the California Supreme Court because attorneys play a special and critical role in the criminal justice and juvenile process. While it is true that this Court's emphasis in *Miranda* on the role of an attorney during the interrogation process was based on the ability of counsel to insure due process by acting as a protective shield for his client suspect (*Miranda v. Arizona, supra* at p. 470.), there can be no question that counsel's ability to provide such protection stems from his legal training and expertise, and

his duty under the canons of ethics for attorneys to act solely on his client's behalf. This Court specifically noted in *In re Gault* (1966) 387 U.S. 1, 35-36, that neither parents nor probation officers have the necessary legal skills possessed by counsel to protect a minor during the interrogation process.

Respondent wholly discounts the legal expertise of counsel as a basis for this Court's ruling in *Miranda* and relies instead on the fact that a probation officer, like an attorney, has the ability to dispel the suspect's fears of the criminal process, to act as a trusted guardian figure for the minor, and to carry out a duty to act on the minor's behalf. (Br. for Resp. pp. 6-7.) Petitioner submits that the above roles can be fulfilled just as well and perhaps even more effectively by a clergyman, counselor, or other responsible adult to whom a particular minor might turn in time of need. In the case of a clergyman, moreover, there is in California a qualified privilege relating to communications between clergyman and penitent. (Cal. Evid. Code §§ 1031, 1033.)[1]

Yet, respondent, like the California Supreme Court, eschews any notion that a request for a clergyman, football coach or other responsible person constitutes per se the invocation of the right to silence. (*In re Michael C. supra*

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[1]California Evidence Code section 1031 provides:

"As used in this article, 'penitent' means a person who has made a penitential communiction to a clergyman."

California Evidence Code section 1033 provides:

"Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege."

at 476; Petn. for Cert., App. A., p. 24; Br. for Resp., p. 17.) Petitioner submits that the rule adopted by the California Supreme Court and the distinctions attempted to be drawn therein cannot withstand serious analysis. Petitioner submits rather that Mr. Justice Rehnquist correctly noted in his orders staying the judgment below that:

> "To treat a request for the presence of an enforcement officer [such as a probation officer] as a *per se* invocation of the right to remain silent cannot but create serious confusion as to where the line is to be drawn in other custodial settings." (*Fare v. Michael C.* (1978) ____ U.S. ____, 99 S.Ct. 3, 5 (Rehnquist, J., sitting as Circuit Justice).)

Petitioner further submits that respondent incorrectly asserts probation officers are not traditional peace officers but rather an arm of the court with a duty to act solely on behalf of their minor clients. (Br. for Resp. pp. 9-10.) Respondent stresses the fact that probation officers no longer bring petitions alleging criminal activities on the part of minors. (Br. for Resp. pp. 9-10.) While this is so (Cal. Welf. & Inst. Code § 650) it is clear that at the time of the instant confession, it was the probation officer who filed a petition which ultimately resulted in respondent's commitment to the California Youth Authority. (Former Cal. Welf. and Inst. Code § 650, Cal. Stats. 1961, ch. 1616, § 2, p. 3477.) The fact that the probation officer no longer serves such a function in California does not support respondent since the issue in this case is the role of the probation officer at the time respondent asked for him. Moreover, even under the present system the probation officer investigates offenses and forwards complaints to the prosecuting attorney who brings petitions for wardship in the juvenile court in California (Calif. Welf. & Inst.

Code §§ 652-653), and moreover, probation officers are still required under Welfare and Institutions Code section 627.5 to advise minors of their rights under *Miranda* prior to questioning them. These provisions of California law by themselves indicate that in California the probation officer is not likely to be viewed by his minor clients as a person charged exclusively with defending them against all other parties. Finally, the fact that the probation officer is an arm of the juvenile court which ultimately determines the appropriate disposition for a minor would hardly lead the minor to believe the officer would protect him against the court itself which the minor may regard as an adversary.

Respondent also relies in his argument on the fact that states differ in their use of probation officers in the juvenile justice process and do not uniformly accord probation officers peace officer status. (Br. for Resp. pp. 11-15.) This lack of uniformity among the states, along with the complicated status of probation officers in California, serves only to reinforce petitioner's position that the role of the probation officer is sufficiently unclear, at least to the layman, as to defy the formulation of a rule which can accurately predict the subjective intent of a minor who requests to see him.

The unreliability of any rule attempting to predict the subjective intent of a minor who requests to see his probation officer is further accentuated by respondent's assertion that a youth of tender years cannot be expected to understand complicated criminal procedures and therefore cannot be expected to call for an attorney when advised of his *Miranda* rights.[2] If it may be expected, as

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[2]Petitioner notes, and respondent concedes (Br. for Resp. p. 5), that this Court has never specifically applied the requirements of *Miranda* to juveniles. Here, because *Miranda* warnings were fully given to respondent, the Court is not called upon to make such a determination. Petitioner would note, however, that the interest of the juvenile court in making a disposition suitable to a minor based on the nature of his conduct as well as the circumstances in which the minor finds himself, cannot be well served by any rule which would preclude the court from consideration of any statement or confession which truly and accurately represents his account of his conduct on an issue pending before the court. Therefore, to the extent that respondent suggests the value of an inflexible exclusionary rule under *Miranda* (Br. for Petr. pp. 24-25.), it is submitted that the rule would be contrary to the interests of the juvenile justice system because such a rule would exclude accurate and voluntary confessions.

respondent suggests, that a minor will encounter difficulty in understanding his right to an attorney under *Miranda*, it surely may be expected that probation officers, whose connection with the juvenile court is apparent and who are required to advise minors of their *Miranda* rights prior to questioning them, will be viewed by minors not as advisors and confidants like attorneys, but rather as law enforcement officers like police officers or prosecutors. That in a given case the converse might also be true indicates only that a request for a probation officer is an ambiguous statement calling for clarification.

In a somewhat exaggerated statement respondent asserts that every statement is to a degree ambiguous. (Br. for Resp. p. 21.) Petitioner submits that even if this were so, no interest of a suspect, and surely no interest of the juvenile court, is diminished by permitting interrogating officers who have a doubt as to the meaning of a minor's response to a *Miranda* advisement to make further inquiries in order to determine the minor's true desires. In the present case the brief inquiry made by the interrogating officer following respondent's request to see his probation officer clearly and finally demonstrated respondent's willingness to speak. The additional questioning not only permitted respondent to answer frankly as to whether or

not he wished to speak, but it also assisted the trier of fact in making its determination as to whether or not respondent voluntarily waived his Fifth Amendment rights.

* * * * * *

II.

RESPONDENT MINOR NEVER CLEARLY EXPRESSED IN ANY MANNER HIS UNWILLINGNESS TO BE INTERROGATED.

Petitioner submits that the record of the interrogation in the instant case fully supports the conclusion of the trial court that respondent minor knowingly and intelligently waived his constitutional rights prior to confessing. Respondent argues that he in fact invoked his rights and indicated his unwillingness to be interrogated. The assertion is based on the inherently coercive nature of the custodial setting, his request for his probation officer, and his statement when readvised on his right to counsel, "How I know you guys won't pull no police officer in and tell me he's an attorney?" (Br. for Resp. pp. 15, 19-22; A, p. 55.) Respondent asserts that his statements under the circumstances of the custodial setting constituted an indication in some manner under the rules of *Miranda v. Arizona, supra* at pp. 445, 473-474, that he wished not to be interrogated.[3]

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[3]Respondent apparently relies on the following language from this Court's ruling in *Miranda v. Arizona*:

> "Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." (*Id.* at p. 445.)
>
> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Id.* at pp. 473-474.)

Petitioner submits not only that respondent never clearly indicated in any manner that he wished not to be interrogated without an attorney present, but also that the California Supreme Court has adopted an incorrect standard for determining the type of statement which requires cessation of further interrogation. The court below held that interrogation must cease when the suspect exhibits any conduct which "reasonably appears inconsistent with a present willingness on the part of a suspect to discuss his case freely and completely with the police *at that time.*" (*In re Michael C., supra,* 21 Cal.3d 471, 475; Petn. for Cert., App. A., p. 22.) Petitioner submits that the standard adopted by the California Supreme Court unnecessarily requires interrogating officers and reviewing courts to speculate as to the subjective intent of a person being interrogated when the actual intent of the suspect may be determined by the asking of a few simple, non-coercive questions.

In the instant case respondent's request for his probation officer was followed by a readvisement of his right to an attorney and his right not to speak to the interrogating officers. Appellant initially asked how he could be sure that the officers would not bring in a police officer and represent that he was an attorney. He was then told that he was free not to speak to the officers if he chose not to. At that point he indicated that he wished to speak to the interrogating officer. The totality of the circumstances surrounding respondent's advisement and waiver of his constitutional rights clearly indicates that his request for his probation officer was simply a request for information regarding the nature of his constitutional rights and not an

expression of a desire to remain silent. Respondent's question regarding the possibility that the police might bring in a fellow police officer and represent that he was an attorney did demonstrate some suspicion on the part of respondent as to the good faith of the police officers; however, his subsequent statements that he wished to speak to the officers indicated that his express waiver of his *Miranda* rights was all the more knowing and voluntary.

Petitioner submits it would have been regrettable had the officers interrupted their conversation with appellant when he made his ambiguous statement regarding his probation officer. The result of such a hasty interruption of the interrogation would have been the loss to the court of a valuable source of information for its ultimate disposition in the case. Respondent's expressed concern that police interrogators will use coercive tactics to obtain waivers unless they are required to cease interrogation by the inflexible rule adopted by the California Supreme Court, is answered by the facts in the instant case. Here, it is clear that the interrogating officers' further inquiries were totally noncoercive in nature and in fact revealed respondent's true desire to speak with them. Had coercive tactics been utilized, the present rule in *Miranda* would have been more than sufficient to permit the trial court to determine that the waiver was involuntary because it was coerced.

Respondent's conduct during the interrogation in the instant case belies his present claim that circumstances of the custodial setting were coercive. The entire interrogation is interspersed with numerous sarcastic comments which demonstrated that respondent was hardly cowed either by the presence of the police officers or the

circumstances in which he found himself.[4] Moreover, the fact that appellant had a probation officer to request is itself some indication that he had some prior contact with the juvenile court.

Petitioner submits based on the foregoing that respondent's waiver of his rights was voluntarily made and that the trial court correctly ruled his subsequent confession admissible as having been made in compliance with the requirements of *Miranda v. Arizona, supra.*

III.

THE RECORD DOES NOT SUPPORT RESPONDENT'S CONTENTION THAT HIS STATEMENTS WERE INVOLUNTARY FOR REASONS OTHER THAN HIS REQUEST FOR HIS PROBATION OFFICER.

Respondent contends that his statements were involun-

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[4]Included among the comments were the following:

"Q. [by the interrogating officer] Well were you out on your feet too?

A. [by respondent] Nope.
Q. You're in the truck yet?
A. Well you probably could say that.
Q. Did you ever get out of the truck?
A. I always get out of the truck.
Q. No. I mean at the time this happened.
A. Yeah, you could say that."
(A, pp. 62-63.)

"A. No. What you want me to do, tell you what he told me?
Q. Yeah.
A. I can't do that.
Q. Why?
A. Because mama said don't tell strangers nothing."
(A, p. 63.)

"Q. Who told you it was a .32?
A. Man, I know guns. I ain't dumb."
(A, p. 70.)

tary as the product of coercion apart from the question of whether he waived his rights under *Miranda v. Arizona, supra.* Respondent raised this contention at every level of state court and it was rejected by every court.

The trier of fact, after listening to the tape recording of the minor's statements and hearing the testimony of the interrogating officer, concluded that respondent had not indicated in any manner that he wished to remain silent or otherwise exercised his privileges under *Miranda.* (A, pp. 41-42.) The California Court of Appeal considered respondent's contention that he was coerced by threats and promises and rejected it, finding that the trial court's conclusions were supported by the record. (Petn. for Cert., App. B., p. 38, fn. 4.)

Although respondent asserts that the California Supreme Court failed to reach this contention that court's rejection of the contention is implicit in the opinion below. The decision of the California Supreme Court below was based solely on the request for a probation officer during custodial interrogation and was premised on an interpretation of the Fifth Amendment to the United States Constitution. (Petn. for Cert., App. A.) Had the California Supreme Court concluded that the matter could have been resolved on factual grounds, that court would never have reached the constitutional issue. It has long been the California Supreme Court's rule of construction that the court will not reach a constitutional question to dispose of the matter before it unless absolutely required to do so. Where the matter can be decided on non-constitutional grounds, the court will decide it on those grounds. (*See In re Roger S.* (1977) 19 Cal.3d 921, 944 [141 Cal. Rptr. 298, 569 P.2d 1286]; *People v. Williams* (1976) 16 Cal.3d 663, 667 [128 Cal. Rptr. 888, 547 P.2d 1000]; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 656, fn. 6 [94 Cal. Rptr. 398, 484 P.2d 70]; *People v. Gilbert* (1969) 1 Cal.3d 475, 481, 484-485 [82 Cal. Rptr. 724, 462 P.2d 580]; *Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 65 [195 P.2d 1].)

The consistent rulings of the California courts that respondent's statements were not the product of any threats or coercion are supported by the record. All of the statements cited by respondent as invocations of the right to silence came after respondent had been advised of his constitutional rights and agreed to talk with police. (A, pp. 54-55.) In fact, even after respondent was told he could not have his probation officer present and inquired as to how he would know whether or not the police would bring in a police officer and say he was an attorney, the interrogating officers readvised respondent of his constitutional rights and stressed the fact that he did not have to talk to them at all if he did not want to. Respondent indicated that he understood his rights and agreed to talk. (A, p. 55.)

The statements which followed the admonition and waiver, viewed in the context of the interrogation, in no way indicate that respondent desired the questioning to cease. Respondent had been talking freely with the officers prior to the cited statements. However, respondent cites four such statements as indications of reluctance to talk. First, near the outset of interrogation, respondent stated, "No, I don't know anything about it." (Referring to the offense.) (A, p. 56.) This statement came after respondent agreed to talk with the police and was told that he had been brought in for questioning about a murder. Respondent indicated that he thought it was for a robbery, not a murder, and the statement in question was merely his initial assertion that he did not know anything about the murder. Respondent continued to discuss his whereabouts and activities on the date of the offense and, it is submitted,

never suggested that he wished to remain silent. (A, pp. 55-56.)

Second, respondent notes that when questioned about what another minor had said, he answered, "I can't do that." And when asked why, he said, "Because mama said don't tell strangers nothing." (A, p. 63.) This was hardly an invocation of the right to be silent. At most it was respondent's indication that he was not going to talk about any of the other minors with him at the time of the offense or what they might have done. In fact, in the context of the interrogation, the statement appears to be merely respondent's effort to inject some sarcasm into the interrogation.

Third, respondent maintains that when asked what happened on the night of the offense he stated, "Can't." (A, p. 64.) This statement came after respondent had been talking to the officers about what happened that night and was not an expression of a desire to cease answering questions. At most, the statement was a repetition of respondent's reluctance to talk about the other minors who were involved, since the statement was followed by respondent's agreement to discuss what he did on the night of the offense. (A, p. 64.)

The fourth statement cited by respondent as an indication that his confession was coerced is a statement by one of the interrogating officers that respondent had a good chance to "come out of this thing pretty good . . .", and that "the one who tells us what happened is the one that's not going to get hassled." (A, p. 65.) Petitioner submits that this statement should not be analyzed out of context, but rather must be considered together with respondent's reaction to the statement. Assuming arguendo that the only implication that may be drawn from the officer's statements is that respondent might benefit by cooperating, respondent's answer belies any inference that he was tricked or coerced into a confession. Following the statement in question, respondent stated, "Well, man, put it like this (Unintelligible) . . . take your word for that because, see I know I've been that there situation, what you just told me. They say that to just get you to cop out and then they'll back whatever you want to call it. They'll fuck you (Unintelligible) . . . just to hear you talking (Unintelligible) . . ." (A, p. 65.) Respondent's reply of disbelief amply supports the implicit finding of the trier of fact, endorsed by the Court of Appeal and the California Supreme Court, that respondent's confession was not the result of any improper trickery.

In *United States v. Washington* (1977) 431 U.S. 181, 187-188, this Court stated, "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." The proper test is whether, considering the totality of the circumstances, the free will of the suspect was overborn. (*Id.* at pp. 187-188; *Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

It is submitted that in the course of an interrogation it is not abnormal for a suspect occasionally to pause, or otherwise to express reluctance to answer some questions. The serious nature of the questioning process would rarely produce a transcript that would read like a casual conversation. Respondent, however, would require more than an admonition and waiver of rights. Respondent would require that every hesitation or ambiguous answer from a suspect be interpreted as an invocation of the right to be silent.

Such a rule would bear little relationship to the interests sought to be protected by *Miranda* and its progeny. The prevention of coerced confessions or otherwise unreliable statements hardly requires a rule prohibiting all question-

ing where an answer is preceded by a slight hesitation. To adopt such a rule would be to forget that a counterpart to the principle against use of coerced and unreliable statements is "the interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." (*Michigan v. Tucker* (1974) 417 U.S. 433, 450.)

Based on the foregoing, petitioner submits that an independent review of the record amply supports the conclusion reached by the trial court that respondent's statements were not coerced, and that there was no invocation of his Fifth Amendment rights. While this Court may independently examine the entire record to determine whether a confession was voluntary (*See Davis v. North Carolina* (1966) 384 U.S. 737, 741-742), an appellate court is not in the same position as a trial court to determine whether a statement is voluntary. The trial court may view the witness' demeanor, assess the suspect's age and maturity, and view the totality of circumstances surrounding the interrogation. For example, respondent contends that during part of the interrogation he was crying. (Resp. Br. p. 33.) The record does not indicate the nature or intensity of the crying. Moreover, the crying could be interpreted as respondent's sorrow over being arrested or over his involvement in the offense. Clearly the trial court considered this and assessed it in light of respondent's age, experience, and maturity when concluding that the statements were voluntary. (A, p. 53.) In addition, respondent first confessed to knowledge and participation in the offense prior to this point in the interrogation. He identified the co-minor who shot the victim (A, p. 62) and later, there is a pause in the recording (A, p. 66), characterized by counsel as crying. (A, p. 47.)

Petitioner submits that the trial court's findings, which were supported by the record and which were reaffirmed by the California Court of Appeal and the California Supreme Court, were correct and that respondent's contention that his statements were involuntary even apart from the issue arising out of his request for his probation officer should likewise be rejected by this Court.

CONCLUSION

For the foregoing reasons and for the reasons heretofore stated in petitioner's papers previously filed in this Court, petitioner respectfully requests that the instant opinion and judgment of the California Supreme Court be reversed and that the judgment declaring respondent a ward of the Superior Court be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-334

KENNETH F. FARE, ACTING CHIEF PROBATION OFFICER,

Petitioner,

vs.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER.

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IN THE

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KENNETH F. FARE, ACTING CHIEF PROBATION OFFICER,

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BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Letters of consent for us to file from counsel for the Petitioner and Respondent have been lodged with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The California District Attorneys Association (CDAA) is a non-profit, public service corporation, which is tax exempt under Section 501(c)3 of the Internal Revenue Code.

CDAA is composed of the state's 58 elected District Attorneys, several elected city attorneys principally engaged in the prosecution of criminal cases, and more than 1,400 prosecutors.

CDAA objectives:

1. To prepare and file Amicus Curiae briefs on important criminal justice issues before California and federal appellate courts.
2. To provide well-organized and effective legislative liaison and public education programs, to analyze and define criminal justice issues, to seek passage of comprehensive and productive laws and judicial reforms to enhance public safety, reduce crime, and preserve the civil liberties and rights of all citizens.

3. To provide legal research assistance to prosecutors in 42 California counties to oppose defense motions to dismiss charges, defense motions to change trial sites, defense writs (mandate, prohibition, habeas corpus) and defense motions to suppress evidence.
4. To reduce duplication of effort by prosecutors' offices throughout California by centralizing the generation of educational materials, training courses, and standards and procedures for use by prosecutors, defense judges, professors and law enforcement personnel.
5. To provide timely and accurate informational and ethical training materials to prosecutors on a regular basis, thus insuring the highest possible standards of professional competence and uniformity among prosecutors, and assisting in the administration of criminal justice.
6. To provide technical resources and clearinghouse services whereby managerial and administrative assistance can be mobilized and disseminated statewide.

Amici believe this case to be of particular importance because it involves a lower court interpretation of *Miranda* v. *Arizona*, 384 U.S. 486 (1966). Any decision of this Court which involves *Miranda* must, of necessity, impact upon every law enforcement officer in the nation. We believe that the expansion of *Miranda*, implicit in the lower court's opinion, is not mandated by this Court's prior rulings involving *Miranda*, nor by common sense or logic. Effective law enforcement will be ill-served if the ruling of the Supreme Court of the State of California is sustained.

ARGUMENT.

I. The Arbitrary Per Se Rule Regarding Confessions Which Was Created by Miranda v. Arizona Is Unrealistic and Lends Itself To Unwarranted Extensions of the Miranda Decision by Lower Courts.

It would be understatement to contend that the 5-to-4 majority holding in *Miranda* v. *Arizona*, 384 U.S. 486 (1966) was a controversial decision.[1] Indeed, the decision was born in controversy; seldom in the history of this Court have the opinions of the four dissenting Justices[2] been more trenchant.

Mr. Justice White, dissenting in *Miranda*, predicted its impact upon the enforcement of the criminal law:

> There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.
>
> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.
>
> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain but a loss in human dignity. 384 U.S. at 542.

Now, some twelve years later, Justice White's prophetic statements have been echoed by California Supreme Court Justice Clark, dissenting in the instant case:

1. Likewise, we believe that it would be redundant to cite scholarly opinion and case law, *pro* and *con*, to this effect. Even a cursory study of the *Miranda* "fallout" in legal literature indicates that a mere footnote on the issue could well be longer than this entire brief.

2. Justices White, Stewart, Clark and Harlan.

> I . . . lament the fact that the majority free a confessed murderer. *In re Michael C.*, 21 Cal.3rd 471, 477, 146 Cal.Rptr. 358, 364, 579 P.2d 7, 13 (1978).

Few could quarrel with the intent and purpose of the majority Justices in *Miranda*. Their aim was to protect Fifth Amendment interests, as the majority Justices perceived them. The fundamental criticism of *Miranda* has been that, in attempting to effectuate their ends, the majority Justices painted with too broad a brush: they flew in the face of years of settled law that voluntariness—determined by the "totality of the circumstances"—was the proper standard for admissibility of confessions;[3] and they created a new and arbitrary *per se* rule of suppression which took no account of the vagaries and the realities of law enforcement work.

On the latter point, a very perceptive study of the United States Supreme Court was made by Mr. Fred P. Graham in his book, "The Self-Inflicted Wound."[4] The subject of this book was the Supreme Court under the Chief Justiceship of Earl Warren and the "self-inflicted wound" was the *Miranda* decision.

Mr. Graham, an attorney and former Supreme Court reporter for the New York Times,[5] is liberally-oriented and basically in agreement with the decisions of the "Warren Court" on criminal justice issues. With regard to the inflexibility of the *Miranda* opinion, however, he wrote:

> This was the core of the Supreme Court's difficulties over *Miranda*—In order to abolish the abuses that cropped up in some but by no means all police investigations, it would have to condemn the 'voluntariness' approach which the Court itself had always approved before and which the

3. "The *ipse dixit* of the majority has no support in our cases. Indeed the Court admits that 'we might not find the defendants' statements (here) to have been involuntary in traditional terms.' " 384 U.S. at 500, Clark, J., dissenting.

4. Graham, "The Self-Inflicted Wound," The McMillan Company, New York, 1970.

5. Mr. Graham is now the legal correspondent for a television network.

police saw as a reasonable way to do their job. If the Court were to frame a prophylactic procedure *rigid enough* to rule out all of the abuses that the voluntariness approach could permit, *it would also outlaw many instances of reasonable, noncoercive police inquiry about crime.*

* * * * *

Also, where the previous landmark decisions had imposed rigid but narrow restrictions on state officials' conduct, *Miranda* was to lay down a statute-like code of procedure consisting of four commandments, some of which included sub-commandments.

* * * * *

Despite the Court's zig zag course, its trend was clear; it would continue to cast about for an objective standard by which police questioning could be regulated *and if the standard proved so rigid that the police could not interrogate effectively at all, that would be a tolerable outcome in* (the majority of) *the Warren Court's eyes.* pp. 156-159 (emphasis supplied).

This, from a highly sympathetic commentator, indicates that the *per se*, prophylactic rule created by *Miranda* had some pitfalls built into it from the start. It was simply too arbitrary. Mr. Justice White, in his dissenting opinion, summed up this point:

> Much of the trouble with the Court's new rule is that it will operate *indiscriminately* in all criminal cases, *regardless of the crime or the circumstances involved.* 384 U.S. at 554 (emphasis supplied).

The opinion of the majority in *Miranda* bears out this contention. It was couched in terms of categorical imperatives, and contained no flexibility whatsoever. For example:

> [W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self incrimination is jeopardized. Procedural safeguards *must be* employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure the exercise of the right will be scrupulously honored the following measures are *required*. He *must* be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights *must* be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation can be used against him. 384 U.S. at 479* (emphasis supplied).

and:

> No amount of circumstantial evidence that the person may have been aware of this right will stand in its stead. 384 U.S. at 471-2.

The terms "must be," "required" and so on, coming as they did, from the highest Court in the nation brooked no abridgment.

Law enforcement, however, is a volatile business; no two cases are the same and no two f ctual situations are the same. Any *per se* rule, such as was imposed on the police by *Miranda*, is bound to come into conflict with the realities of day-to-day police work.

This Court, in its decisions subsequent to *Miranda*, has demonstrated considerable sympathy with this fact.[6] Mr. Justice Rehnquist, sitting as Circuit Justice for the Ninth Circuit, during the Court's 1978 Summer Recess, stayed the mandate of the California Supreme Court and noted probable jurisdiction in the instant case, in part because:

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6. See *e.g.*:- *Michigan* v. *Tucker*, 417 U.S. 433 (1974); *Michigan* v. *Mosley*, 423 U.S. 96 (1975); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

> Sensitive to the tension, and to the substantial burden which the original *Miranda* rules have placed on law enforcement efforts, this Court has consistently been reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. ..... U.S. ..... at ....., 99 S.Ct. 3 at 5 (1978).

There remains, however, another *Miranda*—related problem for law enforcement officers, a problem which has been brought into sharp focus by this case. Because the *per se* rule enunciated in *Miranda* is so arbitrary and so inflexible, lower courts may feel compelled, or at least feel free, to expand on it as they wish, basing their holdings on their own interpretations of *Miranda*.

This problem was also addressed by Mr. Justice Rehnquist in his opinion staying the mandate in this case. Noting that supporters of *Miranda* have claimed that the very rigidity of that decision's *per se* rules have given the police and the courts clear-cut guidance in confession cases, he nevertheless stated:

> [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other counts in the guise of 'interpreting' *Miranda*, particularly if their decisions evinced no principled limitations. ..... U.S. at ....., 99 S.Ct. at 5 (1978).

The expansion-of-*Miranda*-through-judicial-interpretation problem highlights the importance of this particular case, because this case not only presents this Court with the opportunity to put a brake on unwarranted extensions of *Miranda* by lower courts, but, affirmatively to add some more flexibility to the still-too-rigid *per se* rule enunciated in *Miranda*.

Certainly, the arbitrary dictates of the *Miranda* decision have led to some very questionable interpretations of that decision by lower courts. Cases abound in which confessions, which were by any reasonable and objective standard voluntarily made, have been suppressed and patently guilty individuals were freed, or had their convictions reversed. A few examples of this will suffice:

1. *Commonwealth* v. *Singleton*, 439 Pa. 185, 266 A.2d 753 (1970). Defendant confessed to, and was convicted of, murder in the beating death of his mother, sister and grandmother. The court noted that the commonwealth's case consisted primarily of defendant's incriminating statements; however, his statements were nullified and his conviction was reversed. The defendant had been given the proper *Miranda* warnings in every respect except that he was advised that anything that he said could be used "for or against" him. The court held that the use of the single word "for" vitiated the entire confession under the *Miranda* holding.

2. *Commonwealth* v. *Davis*, 440 Pa. 123, 270 A.2d 199 (1970). Again the court reversed a first degree conviction for robbery—murder because the word "for" was included in otherwise satisfactory warnings.

3. *Biggerstaff* v. *State*, 491 P.2d 345 (Okla.App. 1971). The defendant, convicted of first degree murder, had been given *Miranda* warnings which were satisfactory in all respects except that he was advised that he was entitled to an attorney "at any time." The court found this warning to be insufficient advice to the suspect that he had a right to the presence of an attorney during questioning. It cited a similar holding by the United States Court of Appeals for the Fifth Circuit in *Atwell* v. *United States*, 398 F.2d 507 (1968). The court in *Atwell* rejected the use of the words "at any time," stating: " 'Any time' *could* be interpreted by the accused in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or event other than the moment the advice was given and the interrogation following." 398 F.2d at 510 (emphasis added).

   The court in *Biggerstaff* also noted that, absent the defendant's confession, which had been ruled inadmissible, the evidence was not sufficient to sustain a conviction for the crime of murder.

4. *Scott* v. *State*, 251 Ark. 918, 475 S.W.2d 699 (1972). In reversing the defendant's conviction for the rape of a two-year-old girl, the court noted in this case that

there were no eyewitnesses to this crime as the victim was too young and the only other witness, her father, had been killed in an automobile accident. Defendant was properly advised and refused to make a statement. Then, according to the court: "About three months later a deputy sheriff who was passing the cell where Scott was confined asked him, in the course of what appears t. have been a bantering conversation, if he had raped the little girl. Scott replied, 'yeah.'" 475 S.W.2d at 701. This statement was held invalid as not being voluntarily made under *Miranda* and the rape conviction was reversed.

5. *United States* v. *Millen*, 338 F.Supp. 747 (E.D.Wisc. 1972). Defendant was a practicing attorney who caused a package of hashish to be mailed to himself at the office of the law firm for which he worked. Federal agents observed him receive the package and later arrested him. Defendant, after being given the *Miranda* warnings by a federal agent, made inculpatory statements and told the agent where the package was located in his office. Despite the fact that defendant was a *practicing attorney*, his conviction was reversed because the court found that he had not sufficiently waived his rights under *Miranda*, and the court suppressed physical evidence in the case, in part because it was located through defendant's statements.

6. *DuPont* v. *United States*, 259 A.2d 355 (D.C.Cir. 1969). A Washington, D.C. police officer received information that defendant had a machine gun concealed in his bed in a girl's apartment. After receiving from the girl a valid consent to search her apartment, the officer seized the machine gun from the defendant's bed. Defendant was arrested. At the police station the arresting officer called defendant's attention to a large sign on the wall containing the *Miranda* warnings. Defendant refused to look at it. Later a Sergeant Evanoff interrogated defendant. He attempted to give defendant the *Miranda* warnings, but defendant cut him off stating, "I know my rights, man," and, according to the court, defendant indicated: ". . . that Sgt. Evanoff didn't have to go into that." Again defendant

did not look at the card on the wall. Thereafter, defendant made inculpatory statements exonerating the girl in whose apartment the gun was found, called his attorney, and then made further inculpatory statements. The court suppressed all of the defendant's statements as violative of *Miranda*.

Cases such as these are at the core of the problems, created by *Miranda*, for law enforcement officers. In none of the cases noted above could the police interrogation be considered physically or psychologically coercive; the factual guilt of the defendants was not in doubt; yet their convictions were reversed based upon the lower courts' interpretations of *Miranda*.

If we make the rather safe assumption that appellate courts in general do not *want* to reverse the convictions of factually guilty criminals, the only rational conclusion which can be drawn is that those courts felt *compelled* to rule as they did because of the *per se* rule created by *Miranda*.

We acknowledge that the cases which we have described were decided before this Court's decision in *Oregon* v. *Hass*, 420 U.S. 714 (1975). That case held that a state court may not impose greater *Miranda* restrictions, as a matter of their interpretation of federal constitutional law, when this Court "specifically refrains" from imposing them.

Thus it might be argued that, in view of current *Miranda*-related decisions made by this Court, there is little likelihood that lower courts will utilize the interpretation process to expand *Miranda* beyond its original bounds. We submit, however, that this may not be the case for the following reasons.

First, *Oregon* v. *Hass*, prohibits state expansions of *Miranda* only in those cases in which this Court has *specifically refrained* from extending them. Thus, that case would appear to have little effect in *Miranda*-related cases in which this Court has not definitively spoken. For example, this Court has not construed such words of art as "anything you say can be used *for or against you*" (see: *Commonwealth* v. *Singleton*, 439 Pa.

at 186, 266 A.2d at 754) or that a suspect can consult with an attorney "at any time" (see: *Biggerstaff* v. *State*, 491 P.2d at 351); and it is at least questionable that such lower court interpretations of *Miranda* would be covered by *Oregon* v. *Hass*.[7]

Additionally, the sheer volume of cases which this Court is requested to hear obviously prevents many such cases from being reviewed by the Court. As Mr. Justice Rehnquist noted in his opinion staying the mandate in this case:

> This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on *Miranda* and related cases, and, as with many issues that recur in petitions before this Court, we decline most such tenders. ..... U.S. at ....., 99 S.Ct. at 5 (1978).

For the foregoing reasons, we suggest that, despite the holding in *Oregon* v. *Hass*, it is still necessary for this Court, in cases such as this, to address itself directly to the questions of the expansion of the *Miranda* doctrine.

It is, of course, a matter of basic constitutional law that a state supreme court can restrict the powers of law enforcement officers to a greater extent than this Court has done, *provided* that such decisions are based upon interpretations of *state* constitutional or statutory provisions. *California* v. *Krivda*, 409 U.S. 33 (1972); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). This is simply not the case here, however; the decision below was based on the California Supreme Court's interpretation of the Federal Constitution.[8]

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7. *Oregon* v. *Hass*, involved the use of statements taken in violation of *Miranda* to impeach a defendant's credibility at trial. This Court had "specifically" held such statements to be admissible in *Harris* v. *New York*, 401 U.S. 222 (1971).

8. "The decision of the California Supreme Court was clearly premised on the Federal Constitution. It is posited as an extrapolation of *Miranda* and there are no references to state statutory or constitutional grounds." *Fare* v. *Michael C.*, ... U.S. at ....., 99 S.Ct. at 4 (1978), Rehnquist, J., sitting as Circuit Justice.

Thus in this case, this Court is squarely presented with the question whether *Miranda's* dictates should be expanded to equate a request by a murder suspect to speak with his probation officer to an invocation of his Fifth Amendment privilege, thus foreclosing further questioning of that suspect. For the reasons set forth in the next section of this argument we submit that *Miranda* should not be so expanded.

II. The Tortured Interpretation of Miranda, Made by the Lower Court in This Case, Demonstrates the Necessity for This Court to Define a More Flexible Standard for Lower Court Interpretations of Miranda Related Cases.

The Supreme Court of California went far beyond the language and the intent of the majority opinion in *Miranda* v. *Arizona*. That opinion dealt with the Fifth Amendment right of criminal suspects not to incriminate themselves and it made it very clear that the best way to ensure those rights was to have an *attorney* present during questioning if the suspect desired one. As Mr. Justice Rehnquist noted in his opinion staying the mandate in this case:

> The special status given legal counsel in *Miranda's* prophylactic rules is related to the traditional role of *an attorney* as expositor of legal rights and their proper invocation. He is also the principal bulwark between the individual and the state prosecutorial and adjudicative system. ..... U.S. at ....., 99 S.Ct. at 6 (1978) (emphasis added).

Even the most vociferous critics of the *Miranda* decision would be hard put to contest the notion that if a criminal suspect asks to consult with an attorney he should be accorded that right. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). This is as it should be, because, under our system of justice, attorneys are recognized as being those who are best qualified to advise suspects of their rights.

Miranda dealt with the right of the suspect to consult an *attorney*. It made no proviison for the right of a suspect to

consult any other class of advisors. Other persons might or might not be able to advise a suspect in his best interests. For example, the Oklahoma Court of Criminal Appeals recently held that it was improper for the *father* of a juvenile suspect to purport to waive his son's right to have an attorney present during questioning.[9] In this case, at least, advice from a parent was found to be legally flawed and not in the suspect's best interest.

As noted above, the majority in *Miranda* seemed principally concerned with furnishing the suspect with a *lawyer* (and only a lawyer) in order best to protect that suspect's *legal* rights. In this case, however, the California Supreme Court, interpreting *Miranda,* has escalated the constitutional requirement that a request for *legal counsel* must be honored to a point whereby a suspect's request to consult with his *probation officer* triggers the Fifth Amendment privilege.

The lower court appeared to base its holding on two theories: first, that the purpose of juvenile probation officers in California is to "represent the interests" of the juvenile,[10] and therefore probation officers are somehow cloaked with the protective characteristics of attorneys; and, second, that in any event, the murder suspect's request to speak with the probation officer was a "call for help" indicating that he did not wish to speak with the police.

The first of the theories relied on by the lower court can best be described as specious. We submit that it falls within the category of cases, described by Mr. Justice Rehnquist in his opinion staying the mandate in this case, as being an interpretation of *Miranda* which ". . . evinced no principled limitations," ..... U.S. at ....., 99 S.Ct. at 5 (1978).

Probation officers are peace officers under California law, employed by the state, and in the final analysis their duty is to

9. *MDG* v. *State*, Okla.Ct.Crim.App., 24 Cr.L. 2079 (9/26/78).
10. Cal. Welf. & Inst. Code (No. 280).

the state. As Justice Stanley Mosk noted in his concurring opinion in this case:

> Where a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner. 21 Cal.3rd at 476, 146 Cal.Rptr. at 363, 579 P.2d at 12.

The result reached by the California Supreme Court is made even more anomalous when it is considered that the supreme court of another state has ruled that a parole officer (who is in roughly the same position to his ward as is a probation officer) *is,* in fact, a law enforcement officer for purposes of *Miranda* and must give the required warnings if he is interrogating a suspect.[11]

The lower court's rationale in this case, if taken to its logical conclusion, would dictate that a suspect has invoked his privilege if he asked to speak to a police detective who also happened to be a close friend.

The California Supreme Court's "call for help" theory also merits discussion. Under this novel rationale, a suspect who requests to speak to almost *anyone* during custodial interrogation could be held to have invoked his privilege. In fact, the State of California raised this issue in the lower court, contending, with considerable logic, that a request by a suspect to see his clergyman, music teacher or his football coach, could not be distinguished from a request to consult his probation officer.

The California Supreme Court rejected this contention out of hand (21 Cal.3rd at 474, 146 Cal.Rptr. at 361, 579 P.2d at 10), but we suggest that it has merit. The process of arrest or detention and interrogation about a serious crime is, concededly, traumatic. The suspect could "call for help" by asking to speak to any number of persons with whom he is close: a spouse, boyfriend/girlfriend, even an old army buddy; but the question remains, should this be considered as invoking the privilege against self-incrimination?

11. *Gallagher* v. *Ohio*, 38 Ohio St. 291, 313 N.E.2d 396 (1976).

We think not. *Miranda* speaks in terms of the right to consult an *attorney*. It did not create an entire class of surrogate-attorneys consisting of anyone with whom the suspect happens to have a special rapport. Any such holding would expand the *Miranda* doctrine even beyond the intentions of the authors of that doctrine.

In concluding our argument we return to our contention that *per se* rules can only have a detrimental effect on law enforcement; and the instant case illustrates this point clearly. The lower court devised a new, judicially created *per se* rule in this case. Although requested by the State of California to consider the totality of the circumstances in the factual setting surrounding the confession in this case, the lower court expressly refused:

> Here, however, we face conduct which, regardless of *capacity, coercion or voluntariness, per se* invokes the privilege against self-incrimination. 21 Cal.3rd at 475, 146 Cal.Rptr. at 362, 579 P.2d at 10 (emphasis added).

Thus, despite the fact that the suspect, after being fully advised of his rights under *Miranda*, and after his request to see his probation officer was refused, stated, unequivocably: "Yeah, I want to talk to you (the police officer)" 21 Cal.3rd at 473, 146 Cal.Rptr. at 360, 579 P.2d at 8, his confession was suppressed by the lower court.

We submit that this case presents a classic example of every point that the critics of the inflexibility of *Miranda* have raised:

1. There was no coercive activity by the police, either physically or psychologically;
2. The suspect stated expressly that he was willing to talk to the police;
3. The suspect confessed, voluntarily, to a serious crime: murder;
4. He was convicted by a trial court and his conviction was upheld by a unanimous California Court of Appeals;
5. There is nothing in the record on appeal which casts the slightest doubt on Michael C.'s factual guilt.

Yet the California Supreme Court, purporting to interpret federal constitutional issues, created a *per se* rule, that a request by a suspect to consult with his probation officer *automatically*, and without consideration of any other circumstances, invoked the Fifth Amendment privilege; his confession to the crime of murder must be suppressed, *and, in all likelihood the murderer must be freed.*[12]

Herein lies the problem: *Miranda* created its own *per se* rule regarding the admissibility of confessions and the lower court, relying on its own "interpretation" of *Miranda* created yet another *per se* rule. It is inflexibility compounded upon inflexibility, and simple justice is perverted.

This case could well be a vehicle for this Court to enunciate a rule of reason for lower courts to follow in *Miranda*-related cases. We submit that this should be done and we can suggest no better rule than that suggested by the late Justice Tom C. Clark in his dissenting opinion in *Miranda* v. *Arizona*:

> Under the 'totality of circumstances' rule . . . I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of counsel the burden would be on the state to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary. 384 U.S. at 503.

For the foregoing reasons we urge this Court to reverse the judgment of the Supreme Court of the State of California.

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12. "The Court of Appeals observed that without the confession the balance of the evidence is insufficient to sustain the conviction." *In re Michael C.*, 21 Cal.3rd at 477, 146 Cal.Rptr. at 364, 579 P.2d at 13, footnote 2, Clark, J., dissenting.

CONCLUSION.

This Court, in recent years, has limited *Miranda* to its specific holding, and has not mandated *per se* rules involving confessions and admissions. The lower court in this case created a new and inflexible *per se* rule which goes far beyond the letter and spirit of *Miranda*. We suggest that the ruling of the Surpeme Court of the State of California is not constitutionally warranted and we respectfully urge this Court to reverse.

Respectfully submitted,

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